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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 682

COVINGTON MILLS, ALABAMA MILLS, INC., ET AL

Petitioners

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The Petitioners respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit, to the end that this Court may review a judgment which the said Court of Appeals has rendered in the above-entitled cases.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals has not yet been reported. It appears hereinafter as Appendix A.

The final opinion rendered in the District Court is reported at 129 F. Supp. 740. It is also reproduced as Appendix B hereinafter.

The opinion rendered in the District Court upon motions for preliminary injunction has not been reported. It appears hereinafter as Appendix C.

JURISDICTION

The judgment of the Court of Appeals, which the Petitioners seek to have this Court review, was rendered on December 1, 1955 and was on that date entered upon the records of that Court.

After judgment was rendered in the Court of Appeals, the appellees, now petitioners, applied for a rehearing by the Court in banc. This was, on January 10, 1956, denied.

Jurisdiction in this Court to review the judgment of the Court of Appeals, through the issuance of writ of certiorari, is established by the provisions of 28 U.S.C. 1254.

QUESTIONS PRESENTED

Does the Walsh-Healey Act[1] give the Secretary of Labor authority to determine and prescribe, for all work on Government contracts in a given industry, a single, uniform and Nation-wide minimum wage?

Does the Act give the Secretary of Labor authority thus to determine and prescribe a single and uniform minimum wage for the Nation's entire textile industry, in which it is undisputed that minimum wages widely vary?

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[1] 41 U. S. C. 35(b).

Is the determination here in question invalid upon further grounds:—That the Secretary of Labor failed to apprise interested parties of the issues which would govern his determination; that he admitted evidence into the record after the close of his administrative hearing and then rested his determination in large part on such evidence; that he had such preconception with respect to his determination as to preclude impartial decision upon the record; and that he completely misinterpreted the "open market" exemption in the Statute?

STATUTES INVOLVED

Public Contracts Act of 1936, generally known as the Walsh-Healey Act, 41 U.S.C. 35:

> In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:
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> . . .
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> "That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the pre-

vailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;"

Amendment of June 30, 1952, generally known as the Fulbright Amendment to the Walsh-Healey Act, 41 U. S. C. 43a:

"(a) Notwithstanding any provision of section 1003 of Title 5, sections 1001-1011 of Title 5 shall be applicable in the administration of sections 35-39 and 41-43 of this title.

"(b) All wage determinations under section 35(b) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in section 1009 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

"(c) Notwithstanding the inclusion of any stipulations required by any provision of sections 35-45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and

the interpretation of the terms 'locality' 'regular dealer', 'manufacturer' and 'open market' ".

Administrative Procedure Act, 5 U. S. C. 1009(e):

"It (the reviewing Court) shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . or in excess of statutory jurisdiction, authority or limitations . . . "

STATEMENT OF THE CASE

On January 15, 1953, the Secretary of Labor, purporting to act under the provisions of the Walsh-Healey Act, quoted above, issued a minimum wage decree or determination "for the textile industry" (9-14, 18-51)[2]. In this determination the Secretary determined and prescribed, for all work on Government contracts[3] in the textile industry, a single, uniform and Nation-wide minimum wage.

Shortly after the issuance of this determination, the present suits were filed in the United States District Court for the District of Columbia for the purpose of obtaining judicial review of the Secretary's action[4].

This Court had held, in 1940, in *Perkins, et al vs. Lukens Steel Co., et al,* 310 U. S. 113, that private parties had no standing to obtain such review, but in 1952 Congress had

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[2] Unless otherwise indicated, all page references are to the printed Joint Appendix filed in these cases in the Court of Appeals.

[3] Except contracts less than $10,000 in value.

[4] The Secretary of Labor may be sued, of course, only in the United States Courts for the District of Columbia—the District of Columbia being his official place of residence

specifically provided to the contrary, in the Fulbright Amendment to the Walsh-Healey Act, that the Secretary's wage determinations under the Act should be subject to Court review at the instance of private parties. It is conceded (240) on all sides that, by virtue of this amendment to the Act, some, at least, of the plaintiffs, now petitioners, do have complete standing to obtain judicial review of the wage determination here in question[5].

Throughout the case[6], the central issue upon the merits has been: Whether the Walsh-Healey Act gives the Secretary of Labor the power to require persons doing business with the Government to conform to a single and uniform Nation-wide wage standard which he determines and prescribes for their entire industry—or whether the Act gives the Secretary instead a more limited power to require such persons to conform to the wage standards which he finds and determines to be prevailing in their respective localities.

The case first came before District Judge Henry A. Schweinhaut, upon plaintiffs' motions for preliminary in-

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[5] The Secretary of Labor has contended that various other of the plaintiffs, despite the Fulbright Amendment to the Walsh-Healey Act, do not have such standing. It would seem especially fruitless, however, to enter into discussion of these contentions in this the Court of last resort—it being conceded that there are a number of the plaintiffs who, beyond all question and challenge, do have standing to litigate the merits of the case to a conclusion.

[6] The present cases having been consolidated (239) and handled together throughout, they will be herein referred to in the singular.

junction. Addressing himself to the basic issue as to whether the "locality" language of the Statute would permit the Secretary to determine one Nation-wide minimum wage for an industry, Judge Schweinhaut's ruling was that " 'locality' clearly does not mean the United States of America" (123) and that therefore he was of the opinion that the Secretary's determination had not been arrived at "agreeably to the requirement of the statute" (123)[7].

A preliminary injunction (127) was thereupon granted[8] but, advertent to two criticisms which had been voiced by this Court in the *Lukens* case, that is, that the determination there involved had been generally stayed from going into effect and that such injunction had been obtained without the plaintiffs' there incurring any specific obligations, Judge Schweinhaut, in the present case, limited relief to the plaintiffs before the Court and directed, pending the resolution of the case, that whenever any plaintiff might obtain a Government contract, it should file a bond for each such contract.

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[7] Appendix C.

[8] Judge Edward A. Tamm came to the same conclusion in granting preliminary injunctions in the following cases in the District Court:

The Allendale Company, et al vs. James P. Mitchell, Secretary of Labor—Civil Action No. 1630-54.

Central Pennsylvania Open Pit Mining Association, et al vs. James P. Mitchell, Secretary of Labor—Civil Action No. 4962-55.

Ruth Elkhorn Coals, Inc., et al vs. James P. Mitchell, Secretary of Labor—Civil Action No. 5052-55.

This limitation in the scope of the injunction and this requirement as to security have been maintained throughout all subsequent stages of the case[9].

When the case came on for final judgment in the District Court, Judge Alexander Holtzoff reached the conclusion that the determination in question is in "contravention of the Statute" under which it was promulgated and is therefore "invalid" (274)[10].

From this judgment the Secretary of Labor appealed to the United States Court of Appeals for the District of Columbia Circuit[11]. In the Court of Appeals the case was heard and decided by a three-judge division or panel. This division reversed the judgment of the District Court but itself divided, two to one, in reaching a decision. Chief Judge Edgerton and Judge Danaher constituted the division majority. Judge Washington dissented.

The plaintiffs, now petitioners, filed application for a rehearing of the case by the full Court. This was denied, though two members of the Court, other than Judge Washington who had dissented in the decision on the merits, namely, Judge Wilbur K. Miller and Judge Bastian, voted in favor of a rehearing in banc.

Thereafter, a thirty day stay, though opposed by the

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[9] The records in the Office of the Clerk of the District Court show that up to the present time there have been filed in the case 285 bonds, totaling $570,000.00 in amount.

[10] Appendix B; 129 F. Supp. 740, 743.

[11] So did the intervenor defendants, who during the proceedings in the District Court, had been allowed to join themselves as parties defendant, supporting the Secretary's determination.

Secretary of Labor and one of the intervenor defendants, was granted by the Court of Appeals pending the filing of this petition for writ of certiorari.

REASONS FOR ALLOWANCE OF WRIT

This case presents "an important question of federal law which has not been, but should be, settled by this Court"[12]. The matter at issue is of vital import—both in respect to the principle involved and in practical bearing upon the economy of the country.

Congress has enacted legislation[13] for the express purpose of bringing about "ultimate judicial resolution" of the question presented. The Secretary of Labor has himself so recognized and stated:

> "Congress inquired into the problem in 1952, and made provision for its solution . . . Congress disposed of this question by granting to the parties adversely affected by the Secretary's determinations the right to take the question to court for ultimate judicial resolution"[14].

Thus far, however, the matter in controversy has not been by any means clearly or definitively resolved in court. The

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[12] Rule 19 of this Court.

[13] The Fulbright Amendment to the Walsh-Healey Act, 41 U. S. C. 43a.

[14] Decision by James P. Mitchell, Secretary of Labor—In the Matter of Determination of Prevailing Minimum Wages for the Woolen and Worsted Industry. January 27, 1954. 19 Fed. Reg. 535.

only judicial consideration of the issue has been in the United States Courts for the District of Columbia, since, as hereinabove noted, litigation against the Secretary of Labor cannot be conducted elsewhere. But in these Courts there is an unusual divergence of judicial opinion upon the question.

As has been pointed out, the present case was heard in the Court of Appeals by a three-judge division, which itself divided in reaching a decision. It is submitted that the dissent of Judge Washington is highly persuasive and deserves careful consideration.

The ruling of the division majority was admittedly in conflict with the earlier decision of the same Court of Appeals in *Lukens Steel Company, et al vs. Perkins, et al,* 107 F 2d 627[15]. That decision against the Secretary of Labor had, of course, been reversed by this Court—but purely on the matter of standing to sue. This Court did not in that case address itself in any way to the merits of the problem[16].

As has been noted, three able Judges in the District Court separately reached the conclusion that the view later adopted by the division majority in the Court of Appeals is untenable.

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[15] The opinion of the division majority in the present case was written by Judge Edgerton, who had dissented in the *Lukens* case. His dissent in the *Lukens* case was directed, however, not to the merits but to the question of standing to sue.

[16] Moreover, as will be hereinafter pointed out, the *Lukens* case, upon the merits, was not as strong against the Secretary of Labor as is the present case. And in upholding the Secretary here, the division majority went even beyond the position which the Court of Appeals had refused to take in the *Lukens* case.

Thus of all the Judges who have considered the merits of the question here at issue, six, including three Judges of the Court of Appeals, have rejected the position taken by the two who constituted a majority of the division which sat in the present case.

Likewise, as has been hereinabove mentioned, upon the Petitioners applying for a rehearing of the present case by the Court of Appeals in banc, two Judges other than Judge Washington, who had dissented from the decision of the division majority, voted in favor of such rehearing. Judge Washington, apparently considering that the case should move along to this Court, was not himself recorded in favor of rehearing.

To all of this variety and divergence of opinion among the Judges who have considered the matter, might be added the noteworthy fact that the Secretary of Labor has officially conceded that he is himself, "not wholly free from doubt"[17] as to whether he has the authority to make such a determination as is here in issue.

It is respectfully submitted that the situation is indeed one calling for settlement by this Court.

That the ruling by the division majority in the Court of Appeals in the present case is not a true and correct resolu-

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[17] Decision by James P. Mitchell, Secretary of Labor—In the Matter of Determination of Prevailing Minimum Wages for the Woolen and Worsted Industry. January 27, 1954. 19 Fed. Reg. 535.

tion of the matter, is to be seen in the following considerations[18].

The Walsh-Healey Act provides that to be eligible to receive a Government contract, an employer must pay wages "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract"[19].

The question is whether this gives the Secretary of Labor authority to fix a uniform Nation-wide minimum wage floor for an industry, so that all who do business with the Government in that industry shall pay no wage below that floor—notwithstanding, of course, that they already comply, and must comply, with the wage minimum prescribed by Con-

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[18] Although space does not permit the outline of argument on matters other than the central issue of the Secretary's failure to observe the "locality" limitation of the Act, there are other and further grounds upon which the Petitioners contend that the determination in question was unlawful and invalid. Thus, the record shows that the Secretary failed to apprise interested parties of the issues which would govern his determination; that he admitted evidence into the record after the close of his administrative hearing and then rested his determination in large part on such evidence; that he had such preconception with respect to his determination as to preclude impartial decision upon the record; and that he completely misinterpreted the "open market" exemption in the Statute. These matters are developed in the brief for appellees in the Court of Appeals, pp. 44-52, and if opportunity is granted, will be more fully presented to this Court.

[19] 41 U. S. C. 35(b).

gress for industry generally in the Fair Labor Standards Act[20].

More specifically, as hereinbefore expressed, the central issue is: Whether the Walsh-Healey Act gives the Secretary of Labor the power to require persons doing business with the Government to conform to a single and uniform Nation-wide wage standard which he determines and prescribes for their entire industry—or whether the Act gives the Secretary instead a more limited power to require such persons to conform to the wage standards which he finds and determines to be prevailing in their respective localities.

That the Secretary's power is the latter of these and not the former, would seem to be established by a natural and unstrained reading of the language of the Act. The words "in the locality" simply do not permit the Secretary to fix minimum wages on a Nation-wide basis—unless indeed "ordinary English words have lost all meaning"[21].

Congress must be accredited with some degree of intelligence in the use of language. If so, then it is certainly not

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[20] Since a general minimum wage of $1.00 per hour will, by reason of the 1955 amendment to the Fair Labor Standards Act, become effective on March 1, 1956, and since the minimum wage prescribed by the Secretary in the present case is the same figure, question might occur as to whether the case is thereby rendered moot. Such circumstance does not by any means, however, render the case moot, for not only is the question of the Secretary's authority an issue of vital and continuing importance, but possible claims for back wage liabilities are directly at stake—with respect to which, as pointed out above, the petitioners have already filed with the Clerk of the District Court bonds in the amount of $570,000.00.

[21] *United States vs. CIO*, 335 U. S. 106, 128.

to be considered as enacting a United States Statute and employing therein the word "locality" to describe and refer to the whole United States[22].

If there could be any doubt about this, it is certainly put at rest by the pertinent and positive legislative history—which the division majority below completely ignored.

The Walsh-Healey Act grew out of two bills, S. 3055, 74th Cong., 1st Sess. and H. R. 11554, 74th Cong., 2nd Sess., on which, "extensive hearings" were held by the House Judiciary Committee. These bills gave the Secretary of Labor very wide discretion to prescribe uniform minimum wages over the country substantially as he might see fit.

They evoked voluminous and vigorous protest, that vested with authority to require uniform industry-wide minimum wage levels in broad areas, or indeed over the whole Nation, the Secretary would deprive many small manufacturers outside the large industrial centers of all opportunity to obtain Government contracts and would thereby increase the centralization of industry and the monopolization of Government business by the large corporations. It was stressed that there was great need to "encourage" small manufacturing establishments throughout the country; that "should wage differentials be entirely excluded . . . thousands of small manufacturers would be eliminated in bidding"; and that

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[22] The division majority below, in its opinion, said it did not agree "that a large group of States can never be a 'locality' ". But the question presented by this case is not whether the term "locality" in a United States Statute might reasonably mean "a large group of States" as was the issue in the *Lukens* case, but whether "locality" in a United States Statute can reasonably be considered as meaning the entire United States.

it was inevitable and indeed salutary that there should be variation in wage scales "in different parts of the country and in communities of different size, with varying conditions."[23]

The result was that neither of these bills was reported out by the House Committee instead, an entirely new bill was written, which the Secretary has aptly described as a "compromise" of "the different views expressed during the hearings." This new bill[24] was adopted after debate by the House, and by the Senate without debate, and became known as the Walsh-Healey Act.

The sponsors of this bill, in presenting it to Congress, were emphatic and unanimous:[25]

> Mr. Greenwood: "Mr. Speaker, this resolution from the Committee on Rules provides for consideration of what is known as the Walsh-Healey Bill, which Bill regulates specifications in connection with the purchase of supplies by the Government of the United States. It provides that no less than *the prevailing minimum wage* shall be paid to workers *in the community where the supplies are manufactured or where the work is performed*. . . . The Government in buying its supplies

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[23] H. R. hearings on S. 3055, 74th Cong., 1st Sess., pp. 58, 63, 87, 88, 91, 94, 95, 393, 397, 440.

H. R. hearings on H. R. 11554, 74th Cong., 2nd Sess., pp. 237, 239, 245, 249, 250, 251, 391, 302-304, 309, 313, 393, 402-412, 422-436, 440.

[24] Identified as an amendment of and substitute for S. 3055.

[25] Unless otherwise indicated, italics, for emphasis, are petitioners'.

should lead the way . . . and should provide a *minimum wage according to the scale prevailing in the community.* . . . This Bill provides that they (contractors for Government work) shall pay *the prevailing wages in the community where the work is performed.* . . ."[26]

. . .

Mr. Healey: "This Bill does not set the standard for minimum wages by reference to the codes that obtained under N. R. A., but definitely sets it as the prevailing minimum wage for similar work or in the industries operating *in the locality in which the contract is to be performed.*"[27]

. . .

Mr. Citron: "The Bill merely provides that the Government shall have the right to refuse the bids on all purchases over $10,000 to those . . . who pay less than the prevailing rate of wages *in their community.* . . ."[28]

. . .

Mr. Ayers: "This Bill also provides for prevailing wages *in the locality where the work is done.*"[29]

. . .

Mr. Mischener: "It permits the Secretary of Labor, Madam Perkins, to determine what the prevailing

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[26] 80 Cong. Rec. 9992-9993.

[27] 80 Cong. Rec. 10002.

[28] 80 Cong. Rec. 10008.

[29] 80 Cong. Rec. 9286.

minimum wages are *in the locality in which the materials are to be manufactured or furnished.*"[30]

. . .

Mr. Sirovich: "The Walsh-Healey Bill makes it mandatory for all agencies that deal with the United States Government to accept the prevailing wages *in the respective localities* in which the materials, supplies, articles or equipment are to be manufactured or furnished under said contract[31] . . . The minimum wage law in this Bill can fix wages *depending upon what the local community in that particular section where the contract is taken pays for similar work.*"[32]

Congressman Healey, upon being asked whether "the real purpose of the Bill" was to empower the Secretary of Labor to set wages "throughout the country", exclaimed "Oh, no"[33]. And Senator Walsh, in offering an amendment to the Act a year after its enactment, said:

> "It is evident that the legislative intent of the present minimum wage section was to direct the administrative authority to give effect to geographic differentials"[34].

From all of which it is abundantly clear that Congress specifically understood and emphatically intended that mini-

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[30] 80 Cong. Rec. 10006.

[31] 80 Cong. Rec. 10012.

[32] 80 Cong. Rec. 10015.

[33] Hearings on H. R. 11554, 74th Cong., 2nd Sess., pp. 124-125.

[34] 80 Cong. Rec. 3503-3504.

mum wage determinations under the Statute which they were enacting should be made by localities and not on any uniform Nation-wide basis.

Yet, in the present case, not even purporting to determine and prescribe for the various localities of the textile industry "what the prevailing minimum wages are in the locality" or "the scale prevailing in the community"—the Secretary of Labor has instead declared and decreed one uniform and Nation-wide minimum wage for the entire industry[35]. In this he flatly disobeyed the "locality" restriction which Congress advisedly, deliberately and pointedly wrote into the Act. And the opinion of the division majority below overrides the language of the Statute and totally ignores its legislative history to sustain the Secretary's action.

The reasoning of the opinion is that if manufacturers are allowed to perform Government contracts at the wages which the Secretary finds to be prevailing in their respective localities, then some Government business will go to manufacturers in the lower wage-paying localities and the objective of eliminating such manufacturers from Government business will not have been fully accomplished. "Only an industry-wide minimum", says the division majority, can fully accomplish this purpose.

But the division majority assumes the whole case when it assumes that in the Walsh-Healey Act Congress intended *fully* to accomplish such purpose. The vital point of the case

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[35] It is undisputed that minimum wages in the textile industry are in fact not uniform but are characterized by a variety of geographic differentials. (160-162, 211-214)

is that the Walsh-Healey Act *does not go the whole way* toward requiring uniformity of wages among those who compete for Government business.

Both the language and the history of the Act set forth a middle-ground position in which Congress went part of the way, but not all the way, toward requiring uniform wages —not creating authority to compel all manufacturers in an industry to conform to a single standard, and not leaving them free to pay wages as low as they might see fit either— but creating instead authority to compel them, if they desire Government business, to come up to and maintain the prevailing wage levels of their respective localities.

It is of course true that in enacting this legislation, Congress was concerned with the problem of Government business going to "firms that pay sub-standard wages"[36]. But the question at the heart of the case is:—"sub-standard" by what standard? Both the language and the history of the Act answer this question clearly:—that a manufacturer may not have Government business if his wages are sub-standard in relation to the wage level which prevails in his locality[37].

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[36] Determination in present case, Joint Appendix, p. 28, 18 Fed. Reg. 472.

[37] The opinion of the division majority suggests that this becomes reductio ad absurdum when it is considered that there may be no other manufacturer of the same type in the locality. The answer in turn to this is that the Secretary has a wide descretion as to what he will define as a "locality"— though certainly he may not reasonably term the entire United States one "locality", as he has undertaken to do in the present case. Moreover, the Statute expressly authorizes him in determining a minimum wage standard to look to "similar industries or groups of industries" in the locality.

In his dissenting opinion Judge Washington penetrated to this, the crux of the matter, and pointed out that the Walsh-Healey Act has "a restricted objective: that of preventing contractors from cutting wages below prevailing community levels".

Neither the language nor the history of the Act permit the assumption that the Act intends to judge a manufacturer's fitness for Government business by comparing his wages with those of other manufacturers in his industry throughout the whole United States—no matter that this would indeed be the method which would go furthest toward eliminating "low-wage concerns". As Judge Washington concisely emphasizes: "Our function is to determine what Congress thought desirable, rather than to give expression to our own views on social legislation".

The Fair Labor Standards Act[38] is apt example that when Congress desires to set up uniform and Nation-wide wage standards, it is not lacking either in authority or ability to say so. As Judge Washington observes: "Surely it is better to reach decisions of that sort through congressional debate and action, rather than through strained administrative and judicial interpretation of a statute passed years ago for a different and more limited purpose".

It is respectfully submitted that this is a case in which the division majority below simply overrode the language of the Statute in order to implement what it conceived to be "the policy of the legislation as a whole"—*notwithstanding that the "locality" wording of the Statute contradicts such a policy and notwithstanding that those who wrote the*

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[38] 29 U. S. C. 201.

Statute and procured its enactment expressly and positively declared that such was not its policy.

As is aptly stated in the concurring opinion of Justice Frankfurter in *Youngstown Sheet and Tube Company, et al vs. Sawyer:*

> "It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between (the executive) and Congress".
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> *Youngstown Sheet and Tube Company vs. Sawyer*, 343 U. S. 579, 609

At one point the opinion of the division majority seems to suggest that, by the language of the Statute itself, the "locality" limitation does not apply to all methods of wage determination provided in the Act. The opinion takes no note of the fact that this theory, as long ago as the *Lukens* case, was abandoned by the Secretary of Labor as not comporting "with the statutory language"[39]; that the Secretary, as recently as 1952 when the Fulbright Amendment was under consideration, held no such view of the Act[40]; and that

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[39] Brief for Secretary of Labor, filed in this Court in *Perkins, et al vs. Lukens Steel Company, et al*, p. 131.

[40] Hearings on S. 2594, 82nd Cong., 2nd Sess., p. 2475, et seq. 2481 et seq.

certainly, as the legislative history above referred to positively shows, Congress was innocent of any such concept and expressly intended that all wage determinations under the Act should be subject to the "locality" limitation.

Nevertheless, says the division majority's opinion, the Secretaries of Labor, purporting to act under this Statute, have "during many years" prescribed uniform minimum wages on a Nation-wide basis for various industries and since this "practice" has been long continued without repudiation, it should not now be interfered with.

As to this it is first to be noted that if a "consistent" administrative practice has been consistently wrong, then "no amount" of it "is binding upon the Courts"[41]. Next it must be remembered that prior to the instant case the one and only Court which ever examined the Secretary's practice on the merits, namely the Court of Appeals for the District of Columbia Circuit, did repudiate it[42], and that then the doors of the Courts were closed to all review of the matter and have only swung open again with the present case.

To quote again from Judge Washington's opinion: "As far as the argument based on continued administrative interpretation is concerned, I would suppose that we were not entitled to give much weight to action which was until a short time ago completely immune to judicial review".

But, says the opinion of the division majority, the Secre-

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[41] *Texas and Pacific Railway Company vs. United States*, 289 U. S. 627, 640.

[42] It will be recalled that the Secretary was repudiated in treating a group of States as a "locality", whereas he has here treated the whole United States as such.

tary's practice was "called to the attention of committees of Congress", yet Congress wrote no new legislation to require him to change such practice. The committee records vividly show, however, the amazement with which members of Congress, as late as 1950 and 1952, learned that the Secretary was determining minimum wages under the Act on a Nationwide and not on a locality basis[43].

And in 1952 Congress did amend the Act specifically to provide that this "practice" which had been immune to court review should instead be subject to court review. In this, Congress was certainly not approving the Secretary's actions. Indeed the Secretary has officially conceded that Congress has "not" seen fit to "affirm the past practices" of the Secretaries of Labor under the Walsh-Healey Act, but has "left the matter to resolution of the courts"[44].

Upon all of the foregoing—the importance of the issue presented, the disparity of judicial opinion upon the matter, the expressed intent of Congress that the question shall be fully examined and decided in Court, and the force of the considerations which oppose the ruling of the division majority below—it is respectfully submitted that the question at issue is one which should be resolved by this Court.

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[43] Hearings before subcommittee of House Committee on appropriations. H. R. 6008, 81st Cong., 1st Sess., pp. 69-71. Hearings on S-2594, 82nd Cong., 2nd Sess., pp. 2481-2482, 2706, 2708.

[44] Decision by James P. Mitchell, Secretary of Labor—In the Matter of Determination of Prevailing Minimum Wages for the Woolen and Worsted Industry. January 27, 1954. 19 Fed. Reg. 535.

CONCLUSION

For the reasons and upon the grounds herein set forth, the petitioners pray that a writ of certiorari be granted.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12650

JAMES P. MITCHELL, Secretary of Labor, APPELLANT

v.

COVINGTON MILLS, INC., *et al.*, APPELLEES

No. 12651

JAMES P. MITCHELL, Secretary of Labor, APPELLANT

v.

ALABAMA MILLS, INC., *et al.*, APPELLEES

No. 12652

NATIONAL ASSOCIATION OF COTTON MANUFACTURERS, *et al.*, APPELLANTS

v.

COVINGTON MILLS, INC., *et al.*, APPELLEES

No. 12653

NATIONAL ASSOCIATION OF COTTON MANUFACTURERS, *et al.*, APPELLANTS

v.

ALABAMA MILLS, INC., *et al.*, APPELLEES

No. 12654

TEXTILE WORKERS UNION OF AMERICA, CIO, APPELLANT

v.

COVINGTON MILLS, INC., *et al.*, APPELLEES

No. 12655

TEXTILE WORKERS UNION OF AMERICA, CIO, APPELLANT

v.

ALABAMA MILLS, INC., *et al.*, APPELLEES

Appeals from the United States District Court for the District of Columbia

Decided December 1, 1955

Before EDGERTON, Chief Judge, and WASHINGTON and DANAHER, Circuit Judges.

EDGERTON, *Chief Judge:* The Walsh-Healey Public Contracts Act of 1936 provides that any government contract for more than $10,000 shall include a stipulation that all persons employed in manufacturing or furnishing goods under the contract will be paid "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; . . ." 41 U.S.C. § 35 49 STAT. 2036, § 1.

The Secretary of Labor determined in January 1953, after extensive hearings, that the prevailing minimum wage in the Cotton, Silk, and Synthetic Textile Branch of the Textile Industry was $1.00 per hour.

Two separate groups of textile manufacturers brought separate suits against the Secretary, under § 10(b) of the Act, 41 U.S.C. § 43a(b), to set aside and enjoin his determination as illegal.[1] By permission of the District Court the Textile Workers Union of America, CIO, The National Association of Cotton Manufacturers, Berkshire Fine Spinning Associates, Inc., Fitchburg Yarn Company and Hathaway Manufacturing Company intervened as defendants in support of the determination. The cases were consolidated for hearing in the District Court. The court awarded summary judgment to all the plaintiffs and permanently

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[1] Before its effective date, the determination was stayed as to the plaintiffs and the Secretary was temporarily enjoined from putting it into effect as to them. While that order was in force, any plaintiff who entered into a contract otherwise subject to the determination was required to post a bond to pay the prescribed wage if the determination were upheld. We entered a somewhat similar order, requiring a bond of $2,000, pending the present appeal.

enjoined the Secretary from putting the determination into effect as to any of them, on the ground that the Secretary's authority under the Walsh-Healey Act is limited by the word "locality" and that, therefore, he may not determine a minimum wage on an industry-wide basis. The Secretary and the intervenors appeal.

The policy and purpose of the Act are plain. By statute and regulation, government contracts must go to the lowest responsible bidder. Until the Walsh-Healey Act was passed, it followed that the government, though it urged industry to maintain adequate wage standards, was often compelled to undermine them by contracting with low-wage concerns. The Walsh-Healey Act sought to support standards by withholding contracts from such concerns. "This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. As stated in the Report of the House Committee on the Judiciary . . . , 'The object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweat shops.' " *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128. The Act's "purpose is to use the leverage of the Government's immense purchasing power to raise labor standards." *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507.

The Secretary's findings of fact make it clear that in the textile industry, unlike some industries, only an industry-wide minimum will serve this purpose, because the competition is industry-wide. The District Court's construction of the Act would make it necessary for the Secretary to fix separate minima according to the wages that prevail in each separate textile community. This would freeze the competitive advantage of concerns that operate

in low-wage communities and would in effect offer a reward for moving into such communities. Obviously this would defeat the purpose of the Act. It would also make the Act nearly meaningless as applied to a large part of the textile industry, since there is frequently only one textile concern in one neighborhood and it necessarily pays the wages that prevail in its plant

Because the Walsh-Healey Act uses the word "locality," the appellees say that the plain meaning of the Act forbids the Secretary to fix an industry-wide minimum. As to the "plain meaning" of an Act of Congress the Supreme Court has said: "When that meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543.

Moreover, it is not true that the plain meaning of the Walsh-Healey Act forbids the Secretary to fix an industry-wide minimum in this case. It is not plain that every minimum wage determination under the Act must be limited to a "locality." It is not even plain that a large group of States can never be a "locality."[2] The word occurs only in the phrase "currently operating in the locality."[3] The phrase is

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[2] In *Lukens Steel Co.* v. *Perkins*, 70 App. D. C. 354, 107 F. 2d 627, this court expressed a different view. But the Supreme Court reversed the judgment of this court, and affirmed the judgment of the District Court dismissing the complaint, on the ground that the plaintiffs had no standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. This of course left the opinion, as well as the judgment, of this court without value as a precedent.

not plainly intended to qualify any other term than "groups of industries." It may or may not be intended to qualify "the particular or similar industries." It can hardly be intended to qualify "similar work," for "work . . . currently operating in the locality" would be a strange expression. The Secretary found that a dollar an hour is the prevailing minimum on "similar work." He also found that it is the prevailing minimum in the particular industry. In our opinion these findings were fully warranted.

The Secretary's interpretation of the Act as permitting industry-wide determinations of minimum wages is not new. In this industry and many others, during many years, the Secretary has made many such determinations. See, *e.g.*, 41 C.F.R. Parts 202 *et seq.* His practice in this respect has repeatedly been called to the attention of committees of Congress. Attempts have been made to write his interpretation expressly into the Act. Attempts have also been made to write it expressly out of the Act. Both have failed. Congress has chosen to leave the interpretation of the Act to the Secretary and the courts. As the Supreme Court said in regard to a different but somewhat related statute, the Fair Labor Standards Act, "We decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so." *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 17.

Appellees point out that "purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market" are exempt from the statutory requirement of a stipulation that employees will be paid not less than the prevailing minimum determined by the Secretary. 41 U.S.C. § 43, 49 STAT. 2039, § 9. But this ex-

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[3] It has been suggested that the words "in the locality" are not necessarily tied to the words "currently operating", and that "similar work . . . in the locality" is a possible reading. But since it is by no means the only possible reading it is not the "plain meaning" of the Act.

emption has nothing to do with the only matter here in issue, which is the validity of the Secretary's determination. The Secretary determined nothing with regard to the exemption. He determined that "The minimum wage for persons employed in the manufacturing or furnishing of the products of the Cotton, Silk, and Synthetic Textile Branch of the Textile Industry under contracts subject to the Walsh-Healey Public Contracts Act shall be $1.00 an hour arrived at either on a time or piece-rate basis." He did not undertake to decide to what contracts the Walsh-Healey Act, and therefore the minimum wage determination, are applicable. The complaints in these suits do not ask the court to decide that question.[4]

In our opinion the plaintiffs' other objections to the Secretary's determination are likewise invalid.

The District Court thought it need not rule on a motion of the Secretary to dismiss the complaints, on jurisdictional grounds, as to 144 of the 158 plaintiffs. But the fact that some of the plaintiffs clearly have standing, under the Fulbright Amendment, to seek review of the Secretary's

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[4] It is therefore immaterial that the Fulbright Amendment to the Walsh-Healey Act provides that review of the "applicability" of a minimum wage determination may be had by any "person adversely affected or aggrieved". 66 Stat. 308, 41 U.S.C. § 43a(b).

The Fulbright Amendment also provides that "Notwithstanding the inclusion of any stipulations required by any provision of sections 35—45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms 'locality', 'regular dealer', 'manufacturer', and 'open market'." 41 U.S.C. § 43a(c). That is, a contractor who has been required to include a minimum wage stipulation in a contract need not perform the stipulation if the requirement was not in accordance with law. This is irrelevant here.

determination, confers no standing on others. We think the District Court should decide, in the first instance, which plaintiffs have standing. *Cf. B. F. Goodrich Co.* v. *Federal Trade Commission*, 93 U.S. App. D.C. 50, 56, 208 F. 2d 829, 834. The case is remanded with instructions to rule on the motion to dismiss, unless the government withdraws it or the plaintiffs concerned consent to it. As against plaintiffs who are not dismissed, judgment should be entered for the defendant.

Reversed and remanded.

DANAHER, *Circuit Judge*, concurring: I concur in the entire opinion by Chief Judge Edgerton.

I feel impelled to say this: were it not for *Textile Workers Union of America, CIO* v. *The Allendale Company, et al.*,[1] I would dismiss 144 plaintiffs on the present record. Moreover, I believe the District Court should have denied intervention by defendants National Association of Cotton Manufacturers, Berkshire Fine Spinning Associates, Inc., Fitchburg Yarn Company, Hathaway Manufacturing Company and the Textile Workers Union of America, CIO, who are now here as appellants on the side of the Secretary. The Supreme Court held[2] in 1940 that determinations by the Secretary under the Walsh-Healey Act[3] as it then was written, are not judicially reviewable. The Act "was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain."[4] The function of the Secretary, acting in behalf of the Government, is to find the facts,[5] and make his determination which shall be conclusive upon all agencies of the United States. The Act was designed to permit the Government to supply its needs without the delays necessarily incident to judicial supervision of administrative procedure. "If the general law permits prospective bidders to challenge each wage determination of the

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[1] —— U.S. App. D.C.——, —— F. 2d ——, decided July 15, 1955. But see the dissenting opinions.

[2] Perkins v. Lukens Steel Co., 310 U.S. 113, 128 (1940).

[3] 49 STAT. 2036-2040 (1936), as amended, 41 U.S.C. §§ 35-45 (1952)

[4] *Supra* note 2, 310 U.S. at 127.

[5] § 4, 49 STAT. 2038 (1936), as amended, 41 U.S.C. § 38 (1952); (re the fact-finding function see Shannahan v. United States, 303 U.S. 596, 599 (1938)).

Secretary in the courts, by a like token all employees affected could obtain judicial review."[6] We have been advised that "Courts should not, where Congress has not done so, subject purchasing agencies of the Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies."[7] Not only do such expressions by the Court correctly, in my opinion, reflect the understanding and purpose of the Congress, but this case illustrates peculiarly the situation which Congress sought to avoid. It is now nearly three years since the Secretary's determination was promulgated, and it is no more nearly effective now than when it was first made. Yet 144 plaintiffs and 5 defendants as "parties" in the District Court still, because of their status as parties, respectively have rights of appeal no matter which way our order goes.[8]

It is said that these "parties" are thus able completely to frustrate the reasonable fulfillment of the Congressional objective because "rights" have been conferred upon them by the Fulbright amendment,[9] adopted in 1952. In terms it was provided that review "may be had within 90 days after such determination is made," and ten of the original plaintiffs sought review after the 90 day statutory period had expired. As to them the motion to dismiss should be granted. The Fulbright amendment further provided that review was to be had only "by any person adversely affected or aggrieved" by the determination. Only 14 plaintiffs have made a showing that the determination "results in direct and

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[6] *Supra* note 2, 310 U.S. at 131.

[7] *Id.* at 130.

[8] Cf. Fishgold v. Sullivan Corp., 328 U.S. 275 (1946); Boston Tow Boat Co. v. U. S. 321 U.S. 632, 633 (1944).

[9] 41 U.S.C. § 43(a) (1952).

immediate injury."[10] So, I would dismiss as to 144 "plaintiffs," leaving only the 14 in the Alabama case and none in the Covington case. The named intervening appellants by the Secretary's determination have not been subjected to or threatened with any legal wrong. They have shown no independent legal right. They are not "private Attorney Generals,"[11] and the Secretary is ably represented here by the Attorney General. Even the Fulbright amendment confers no standing upon those who appear on the side of the Secretary. I believe their intervention never should have been allowed.

This is not a case involving a determination of public convenience and necessity such as *National Coal Ass'n* v. *Federal Power Commission*.[12] This is not a case like *Columbia System* v. *United States*,[13] where "the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked." This is not a case like *Associated Industries* v. *Ickes*,[14] where by administrative order, the minimum prices at which coal could be sold were increased, thus affecting the very basis upon which transactions in the coal business could

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[10] National Coal Ass'n v. Federal Power Commission, 89 U.S. App. D.C. 135, 138, 191 F. 2d 462, 465 (D.C. Cir. 1951).

[11] Associated Industries v. Ickes, 134 F. 2d 694, 704 (2d Cir. 1943), *order vacated*, 320 U.S. 707 (1943). The able opinion by Judge Frank treats of almost every conceivable situation except that presented on the record here.

[12] *Supra* note 10. (Even there Judge Clark, in his dissent, argued well that the petitioners were not "parties aggrieved" within the meaning of the Natural Gas Act.)

[13] 316 U.S. 407, 422 (1942).

[14] *Supra* note 11.

be conducted. Nor is the case like *United States Cane Sugar Refiners' Ass'n* v. *McNutt*,[15] or *Longshoremen's Union* v. *Boyd*,[16] where the suit was dismissed for want of a "case or controversy." This is a case, *sui generis*, where "Congress, as incident to its power to authorize and enforce contracts for public works, may require that they shall be carried out only in a way consistent with its views of public policy. . . ."[17] No one is forced to bid for Government contracts. Not foreign to our problem are the considerations reasoned by this court in *Alabama Power Co.* v. *Ickes*.[18] I believe the Congressional interest in the attainment of the objectives of the Walsh-Healey Act and the Government's undoubted right to lay down the conditions upon which its own business will be conducted compel a strict construction of the Fulbright amendment. Any other view makes a shambles of the Walsh-Healey Act, for the delays and confusion occasioned by the hordes of "parties" render a determination obsolete and ineffective. Thus those who properly may be parties are those, and only those, who can show themselves by direct and immediate injury to have been adversely affected or aggrieved by the Secretary's determination.

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[15] 138 F. 2d 116 (2d Cir. 1943) (where the petition was dismissed for lack of jurisdiction).

[16] 347 U.S. 222 (1954). (The point is certainly present here.)

[17] Ellis v. United States, 206 U.S. 246, 256 (1907).

[18] 67 App. D.C. 230, 91 F. 2d 303 (D.C. Cir. 1937), *aff'd*, 302 U.S. 464 (1948).

WASHINGTON, *Circuit Judge*, dissenting: The central issue here, of course, is whether the Walsh-Healey Act was intended to establish a nation-wide wage standard for Government contractors, or a standard based on wages prevailing in the contractor's own community. To my mind the language of the statute clearly establishes the latter standard. This court so held in a case decided shortly after the passage of the Act. *Lukens Steel Co.* v. *Perkins*, 70 App. D.C. 354, 107 F. 2d 627 (1939). The opinion—an exhaustive one—was written by Associate Justice Justin Miller, and was concurred in by Associate Justice Fred M. Vinson, who had become a member of this court after serving in Congress during the very period in which the Walsh-Healey Act was passed. The reasoning of the opinion seems to me unanswerable. And the legislative history there recited shows with complete clarity what Congress intended: that bidders for Government contracts "shall pay the prevailing wages in the community where the work is performed."[1]

Our decision in *Lukens* was reversed by the Supreme Court on another ground—that the complainants lacked standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940). The obstacle has now been removed by the Fulbright Amendment, passed in 1952. 41 U.S.C. § 43a (1952). Technically, in dealing with the present case, we are not "bound" by our decision in *Lukens*, even though the Supreme Court did not reach the merits of that case. But its reasoning remains sound, and has not been disturbed by anything which has happened since. As far as the argument based on continued administrative interpretation is concerned, I would suppose that we were not entitled to give much weight to action which was until a short time ago completely immune to judicial review. Nor, under the circumstances here, does congressional failure to amend an act

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[1] Congressman Greenwood at 80 Cong. Rec. 9993; quoted at p. 362 of 70 App. D.C., p. 635 of 107 F. 2d, together with numerous similar statements.

already clear on its face seem to be in any sense declaratory of the correctness of the Secretary's interpretation. The latest pronouncement of Congress—the Fulbright Amendment—certainly makes no such declaration: its passage might suggest, indeed, that Congress was not content with the Secretary's action, and wished it to be reviewed by the courts. The relevant Committee Report specifically states that failure to amend the "locality" provision of the Act is to be without prejudice to a judicial determination of the meaning of that provision. S. Rep. No. 1599, 82d Cong., 2d Sess. 31 (1952).

It is argued that to give the "locality" provision its ordinary meaning would produce an undesirable result. But—whether or not that is so—our function is to determine what Congress thought desirable, rather than to give expression to our own views on social legislation. It is also said that the purpose of the Act would be defeated by such an interpretation. But I think the majority misconceives the purpose of the Act, as revealed in the light of conditions prevailing in 1936, when it was passed. At that time, and before, it was generally thought that the Federal Government lacked power to undertake broad regulation of wages and labor standards. Control of Government contracts was thought possible, however, and in 1931 the Bacon-Davis Act was passed, imposing certain wage regulations in the field of Government construction contracts, 46 Stat. 1494. In 1935 that Act was substantially revised and strengthened, 49 Stat. 1011. The 1935 revision provided—in language derived from the earlier legislation—for wage determinations based on conditions prevailing in the "city, town, village, or other civil subdivision" where the contract is to be performed. In 1936 the Walsh-Healey Act was passed to cover the field of supply contracts. Here Congress used the "locality" provision we have been discussing. Obviously both acts are based on the same philosophy and point to a standard limited to a fairly small area and to a restricted objective: that of preventing contractors from cutting wages below prevailing community

levels in an effort to pare costs and thus be the lowest bidder. As the legislative history shows, there was no thought of raising wages, or of eliminating regional differentials. See *Lukens* at p. 362 of 70 App. D.C., 635 of 107 F.2d.

Later, of course, greater breadth of Federal power was recognized. The Supreme Court's decision in *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937), opened the door to more sweeping congressional action. Problems such as that of the "runaway industry," which were not intended to be dealt with by the Walsh-Healey Act, but which may underlie the Secretary of Labor's approach to that Act, may now be dealt with by explicit Federal legislation. Congress has gone far in this direction through the Fair Labor Standards Act and its amendments. Indeed, under an amendment shortly to come into effect, the minimum F.L.S.A. wage will be raised to a dollar an hour. Public Law 381, 84th Cong., 1st Sess. § 3 (1955). That, of course, is the same as the Secretary's determination here. Surely it is better to reach decisions of that sort through congressional debate and action, rather than through strained administrative and judicial interpretation of a statute passed years ago for a different and more limited purpose.

APPENDIX B

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 259-53

COVINGTON MILLS, ET AL,

Plaintiffs

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL,

Defendants

Civil Action No. 614-53

ALABAMA MILLS, ET AL,

Plaintiffs

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL,

Defendants

HOLTZOFF, District Judge.

This case comes before the Court on cross motions for summary judgment. The action is brought for a declaratory judgment to adjudicate an order by the Secretary of Labor to be invalid as in contravention of the statute pursuant to which it was promulgated.

The order in question fixed a minimum wage for persons employed in certain branches of the textile industry in con-

nection with Government contracts. This was done pursuant to the Walsh-Healey Public Contracts Act. The prevailing wage as determined by the order in question, promulgated on December 5, 1952, was to be the same throughout the United States.

The Walsh-Healey Act, pursuant to which this order was promulgated, 41 U.S.C.A. § 35 et seq. relates to Government contracts for the manufacture or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000. One of the provisions of the Act is that there shall be included in each contract a representation and stipulation that all persons employed by the contractor in its performance will be paid not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract.

It is contended by the plaintiffs that under this provision the Secretary of Labor is without power to fix a single prevailing minimum wage for a particular industry on a nationwide basis. To determine whether this objection is sound it is necessary to analyze the pertinent phraseology of the Act. The Secretary of Labor is directed to determine the prevailing minimum wages for persons employed on similar work, or persons employed in the particular or similar industries, or persons employed in groups of industries. In other words, he may act under any one of these three provisions. These provisions are followed by the clause, "currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract."

It is contended by the defendants that the words "currently operating in the locality" are limited only to the last of the three alternatives, namely, persons employed in sim-

ilar groups of industries. On the other hand, the plaintiffs claim, contrary to the contention of the Secretary, that those words relate back to all of the three clauses. There is some ambiguity in the statute. It is difficult to construe it according to strict grammatical requirements. The words "currently operating" seem inapplicable to the noun "work" or to the noun "industries." It is, perhaps, an unfortunate choice of words, but it seems to the Court that the phrase "currently operating" may not be construed as being limited solely to the last of the alternatives but relates back to each of them, namely, persons employed on similar work currently operating in the locality, or, persons employed in the particular or similar industries currently operating in the locality, or persons employed in similar groups of industries operating in the locality. This is the interpretation, in the opinion of this Court, which should be accorded to those words.

In this connection, the Court wishes to call attention to the fact that when the construction of this provision was first raised in litigation in Lukens Steel Co. v. Perkins, 70 App. D. C. 354, 107 F. 2d 627, 630, the point now made by counsel for the Secretary of Labor was not advanced, but it seemed to be assumed that the words " ' currently operating in the locality' " were applicable to and limited each of the three alternatives. Apparently the present construction sought to be applied by counsel for the Secretary of Labor is more or less of an afterthought.

Since the phrase "currently operating in the locality" applies to each of the three alternatives, the next question to be determined is whether the entire United States of America can be considered as a single locality in the discretion of the Secretary. To be sure, the word, "locality" is an indefinite term. It may mean a single community. It may mean a county. It may mean a region. A considerable degree of discretion is vested in the Secretary to determine what shall constitute a "locality" for any particular purpose. So long as the construction placed by the Secretary is reason-

able, the Court may not set it aside. May it be said, within reason, that the entire United States of America may be regarded as a single "locality"? It seems to the Court that to attach this interpretation to this term would be to place a tortured interpretation and attach a distorted meaning to a simple English word.

Such a type of interpretation and construction of words was satirized by a great English satirist in the well-known book "Through the Looking Glass." This book records a dialogue between Alice and Humpty Dumpty and says:

> " 'When I use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more or less'.
>
> " 'The question is', said Alice, 'whether you can make words mean so many different things.'
>
> " 'The question is', said Humpty Dumpty, 'which is to be master—that's all' ".

The Court is not going to place its seal of approval upon that type of construction of plain English words. The Court is of the opinion that under no circumstances is it reasonable to construe the word "locality" as applicable to the entire United States of America and calling the entire country a single "locality".

The Court is especially impelled to this conclusion by the opinion of the Court of Appeals for the District of Columbia Circuit in Lukens Steel Co. v. Perkins, 70 App. D. C. 354, 107 F. 2d 627. That case involved the validity of an order under this statute, which fixed wages in the steel industry at a single figure for an area of about fourteen states and the District of Columbia and referred to them as a "locality". In an opinion written by Mr. Justice Justin Miller, in which Mr. Justice Vinson, then a member of that court, concurred, it was very cogently and persuasively held that the word "locality" may not be used to describe a broad area consisting of fourteen states and the District of Columbia. On this

point the court made the following observations, 107 F. 2d at pages 630, 631:

> "It is true that the word *locality* is one of somewhat indefinite meaning. Still, its indefiniteness has certain well recognized limits in common meaning and usage, which exclude and forbid the interpretation placed upon the word by the appellees in their determination".

And again the court stated:

> "In ordinary and common usage *locality* is synonymous in meaning with such words as *place, vicinity, neighborhood and community*. These words, also, are too indefinite to be used for purposes of exact measurement in terms of acres or square miles. But neither they nor *locality* itself, in any case, connote large geographical areas, with widely diverse interests, such as the fourteen states and the District of Columbia, grouped in the protested determination". (Emphasis original).

A *fortiori,* if fourteen states is too large an area to be deemed a single locality, it necessarily follows that the United States of America is much too large an area to be so considered.

In that case Mr. Justice Edgerton dissented. He did not disagree with the interpretation by the majority of the word "locality", but reached the conclusion that the plaintiffs had no standing to sue and for that reason and that reason alone felt that the bill of complaint should be dismissed. The Supreme Court reversed the determination of the Court of Appeals, 310 U. S. 113, 60 S. Ct. 869, 84 L. Ed 1108. The Supreme Court, however, did not discuss the views of the majority of the Court of Appeals as to what is meant by "locality", but merely held that the complaint should be dismissed on the ground that the plaintiffs had no standing to sue. This procedural obstacle was later overcome by the so-called "Fulbright Amendment", which permits judicial review of the determinations of the Secretary of Labor under

the Walsh-Healey Act pursuant to the provisions of the Administrative Procedure Act, 5 U. S. C. A. § 1001 et seq.[1]

The Court is impressed with arguments made by counsel as to the administrative difficulty that would be created if the Secretary of Labor were not to be permitted to make nation wide determinations under the Walsh-Healey Act. The Court is further impressed with the argument that it is desirable from a social and economic standpoint in some instances to fix the rate of prevailing wages on a nation wide basis. The Court expresses no opinion on these points because they are not for the judiciary to determine. These arguments should be addressed to the Congress, because they relate to policy and expediency and not to the interpretation and the meaning of what the Congress has already enacted.

Accordingly, the Court will hold that for the reasons stated the order of the Secretary of Labor here involved is invalid as in contravention of the statute, and will deny defendants' motion for summary judgment and grant the plaintiffs' cross motion for the same relief.

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[1] 41 U. S. C. A. § 43a, added June 30, 1952, 66 Stat. 308.

APPENDIX C

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 259-53

COVINGTON MILLS, ET AL,

Plaintiffs

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR,

Defendant

Civil Action No. 614-53

ALABAMA MILLS, ET AL,

Plaintiffs

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR,

Defendant

Upon Motions For Preliminary Injunction

SCHWEINHAUT, District Judge.

Gentlemen, I am persuaded that I must stay the effective date of this order. Having read this file completely—perhaps not as studiously as more time would permit, but certainly completely yesterday and last night—and having heard very able arguments and very helpful arguments today, there is very grave doubt in my mind about whether or not the Secretary arrived at his order pursuant to law.

It is my impression, shall I put it, at this time, that he did not; because it seems to me "locality" clearly does not mean the United States of America. The efforts to come up with something that would be workable and meaningful all were directed in the Congress to something less than the entire United States. Therefore, as I say, I have very grave doubts and lean to the opinion that it was not legally arrived at, in the sense that it was not arrived at agreeably to the requirement of the statute.

Then we must ask whether or not, that being so, these plaintiffs have any right to complain about it. I think they clearly do; and I think they do for two reasons: One is, I think they are aggrieved; at least, can be. They have a right, since they are in this industry to seek, even if they had not done so before, Government contracts; and it seems to me they have a right to seek them on the basis of regulations legally arrived at, and not to have the burden put upon them of contriving and fashioning a bid onerous to them, as they think, which they believe is based upon a concept that is illegal in its nature.

Also, I think that if they are right about it, and that this should turn out to be held by the Court to have been illegally arrived at, then they can indeed suffer irreparable injury, for what I think are the rather obvious reasons expressed here today.

Moreover, I think they have a standing to sue for the simple reason that the statute said they may have it. There never was a statute more clearly designed to overturn a decision of a court than this one. I speak, of course, of the Fulbright Amendment. There is no doubt about it, that the Lukens case, in 310 U. S., would have kept these plaintiffs out of court. There is equally no doubt in my mind, in this preliminary stage of this case, that Senator Fulbright and the Congress, which went along with him, intended to cure

that and to open the door to plaintiffs such as these to the courts to obtain the very kind of review they are seeking here.

Now, I do not pass upon the merits, and the opinions I express in that regard, insofar as they may concern the merits, are very definitely curbstone. This case will not come before me, since I am in the Motions Court, and I do now advance the case for final hearing; since it is a matter that should not be left hanging in a state of hiatus.

I believe my duty at this point is absolutely clear; and that is to stay the effective date of this order.

Office - Supreme Court, U.S.
FILED
MAR 7 1956
HAROLD B. WILLEY, Clerk

No. 682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

COVINGTON MILLS, ALABAMA MILLS, INC., et al
Petitioners

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR,
TEXTILE WORKERS UNION OF AMERICA,
NATIONAL ASSOCIATION OF COTTON MANUFACTURERS,
et al

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT TEXTILE WORKERS UNION OF AMERICA IN OPPOSITION

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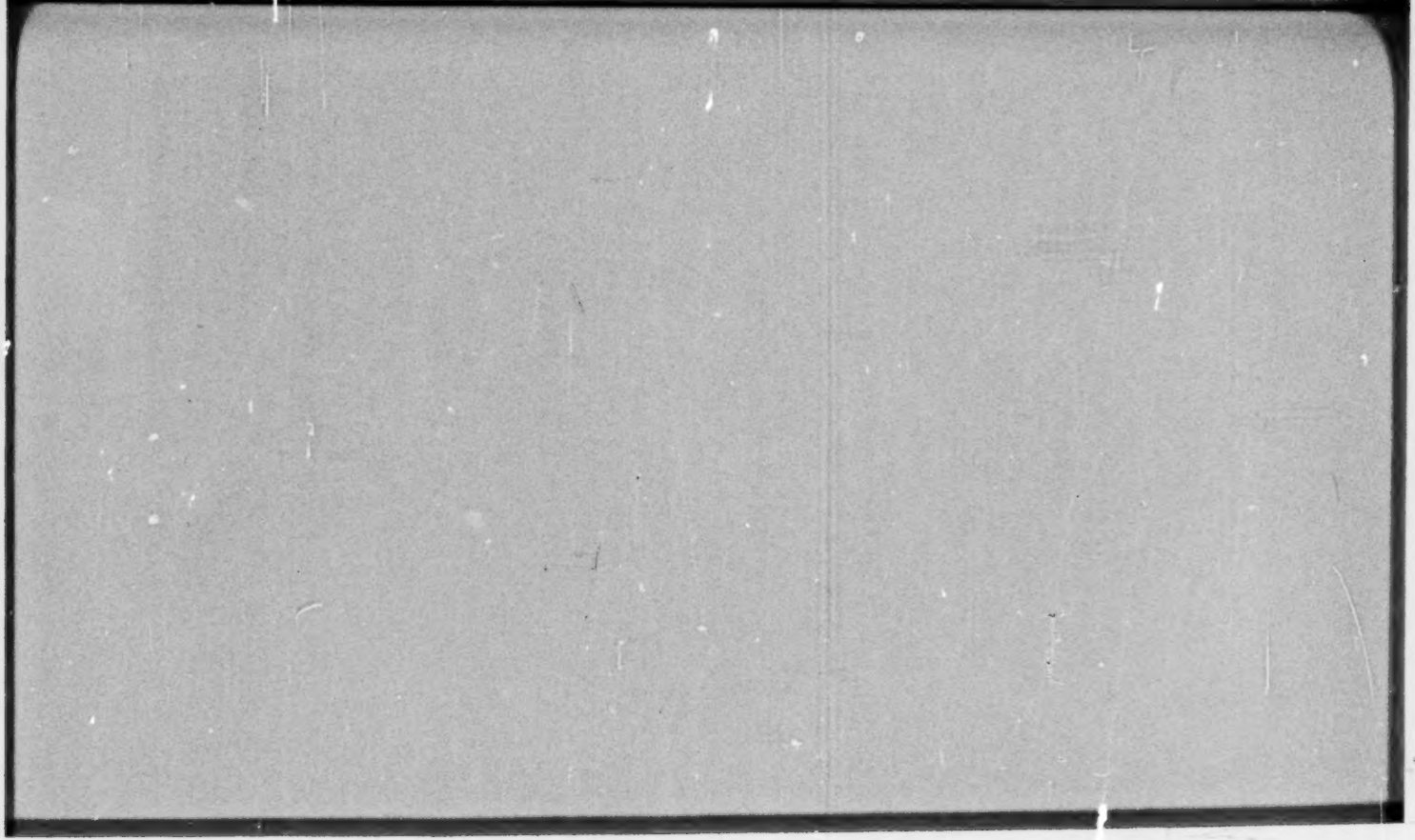

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et al

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT TEXTILE WORKERS UNION OF AMERICA IN OPPOSITION

QUESTIONS PRESENTED

1. Whether, in determining the minimum wage which government procurement agencies shall specify in their contracts for the purchase of textile products, the Secretary of Labor is required by the Walsh-Healey Act to disregard his finding that there is a single competitive nation-wide market, unrelated to the geographic location of producing units, for products of the textile industry, and required to find separate textile minima for each locality in which textiles are manufactured or furnished.

2. Whether Congress can constitutionally give the Federal Courts the duty of overseeing, at the behest of any manufacturer or dealer in the affected industry, the Secretary of Labor's determination as to the terms on which government procurement agencies shall offer to purchase supplies.

STATEMENT

The statement of the case in the petition for certiorari omits several pertinent facts.

Under the Walsh-Healey Act the Secretary of Labor is required to determine for the government procurement agencies the minimum wage which such agencies shall specify in their contracts as the minimum wage to be paid in the performance of the work contracted for. Since 1948, the minimum wage so determined, on a single industry basis, for the textile industry has been 87 cents per hour. 13 F.R. 6083. In January, 1952, the Textile Workers Union of America filed a petition with the Secretary of Labor claiming that this determination was out-dated because of the increased wage levels in the industry and asking, therefore, that he make a new finding as to the prevailing minimum wage in the industry. (R. 18, 55.)

Hearings were held in September, 1952, a notice of proposed amendments to the pre-existing wage determination was issued, exceptions were filed to this proposed amendment, and finally on January 15, 1953, the Secretary of Labor issued the final notice of amendment which is here under attack. (R. 9, 14, 55.) Insofar as here relevant, the amendment found that the prevailing minimum wage for persons employed in the manufacturing or furnishing of the products of the cotton, silk and synthetic branch of the textile industry was $1.00 per hour.

It is this amendment to the Secretary's pre-existing finding as to the prevailing minimum wage in the textile industry which is here under attack.

The principal issue in the administrative proceeding, from the beginning, was whether the Secretary, in making his

finding as to the prevailing minimum wage for this particular industry, should make a single industry-wide finding, as in the past, or should make separate, individual determinations of the prevailing minimum wage for textile plants in each of the separate local communities in which textiles are produced. (It was never urged, so far as we know, that the Secretary should make findings as to the prevailing minimum wages for *all* workers in each local community, or even for workers in selected groups of industries in each community. The contention, rather, was for a determination of the minimum *textile* wage in each community.)

The Secretary did not make his determination on this contested issue in a vacuum. On the contrary, his final decision was based on the specific findings as to the nature of this particular industry which are set forth on pages 30-32 of the record. The testimony before the Secretary showed, and he found, that competition in this industry is nationwide in scope and marketing of the products of the industry is on a national scale. It is rare in this industry for a mill to market its product within a limited geographical area. The usual practice, indeed, is to sell the vast bulk of textiles through the textile center known as Worth Street in New York City. In this center, producers of textiles from such widely separate areas as Maine and Alabama compete for the same business, and the location of a plant has virtually no effect on its competitive position.

The same pattern which the Secretary found to be true of the industry generally applied to government purchases of textiles. In the normal case, the government invites bids from firms located in every textile producing area and bids are received from mills in widely separated regions. There is no way of ascertaining in advance where a proposed government textile contract may be performed. Indeed, various steps in the processing of a single product may take place in different states and different regions.

Based on these findings as to the nature of the textile industry, the Secretary concluded that the only appropriate way of effectuating the purposes of the Act was to continue the previous practice, with respect to wage determinations in this particular industry, of investigating and finding the prevailing minimum wage on an industry-wide basis. On the basis of data covering the entire industry, he found that the prevailing minimum wage was $1.00 per hour.

The Secretary's determination was immediately challenged in the courts in this proceeding. His findings with respect to the nature of the industry and the need for an industry-wide determination were not challenged. Instead, it was urged that the Secretary lacked authority under the Walsh-Healey Act to make this kind of determination, irrespective of the nature of the industry.

This contention was upheld in the District Court, which felt compelled to follow the decision of the Court of Appeals in *Lukens Steel Co.* v. *Perkins,* 107 F. 2nd 627 (D.C. Cir. 1939) *reversed on other grounds,* 310 U.S. 113. The Court of Appeals, however, reversed, refusing to upset an administrative practice of 19 years' standing which Congress itself had refused to change. One judge dissented. A petition for rehearing was filed and denied by the whole Court, with two members other than the judge who had dissented on the merits voting in favor of a hearing *en banc.*

SUMMARY OF ARGUMENT

This case arises as a result of an unsuccessful effort to amend the Walsh-Healey Act so as to change its consistent, 19 year old, interpretation. The proponents of the substantive charges in the Act, being unable to pass them, settled for a provision throwing this hot political issue into the courts. Having no choice, the Court of Appeals took jurisdiction, but refused to reverse the administrative interpretation which Congress had itself refused to change.

The decision of the Court of Appeals is correct and accords with both the proper judicial approach to this kind of problem and the language of the statute itself. There is no conflict with the decision of any other Court of Appeals and none is likely to appear. If this Court denies certiorari, the question of statutory interpretation involved will, for all practical purposes, be finally resolved and the Secretary of Labor will be free to continue to apply the Walsh-Healey Act in the same way as it has been consistently applied in the 20 years since its passage.

By denying certiorari the Court will, furthermore, avoid decision of the difficult constitutional question—not decided by any of the courts below—of whether Congress may constitutionally confer jurisdiction on the Federal courts to adjudicate what this Court has found, in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 not to present a justiciable case or controversy.

ARGUMENT

I. THIS COURT SHOULD NOT UNDERTAKE TO REVIEW ACTION BY THE SECRETARY AS HOUSEKEEPING AGENT FOR THE GOVERNMENT WHICH CONGRESS HAS REFUSED TO REVERSE

This is, in many respects, an extraordinary litigation. Unlike most cases of judicial review of administrative action, there is here no administrative ruling directly bearing on the litigants. The Walsh-Healey Act, unlike the Fair Labor Standards Act, does not in itself require anyone to pay a certain level of wages. Nor does a minimum wage determination by the Secretary of Labor under the Act have such an effect.

The nature of the Act and of the determinations made by the Secretary under it have been aptly described by this Court in the *Lukens Steel* case:

"Acting through its agents as it must of necessity,

> the Government may for the purpose of keeping its own house in order lay down guideposts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act." 310 U.S. at 127.
>
> "In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal . . . For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority." 310 U.S. at 129.

Furthermore, as this Court also said in *Lukens*:

> "the process of arriving at a wage determination [by the Secretary of Labor] contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept." 310 U.S. at 113.

Why, then, in the light of the nature of the Act and of the Secretary's function in making a wage determination, did Congress reverse the decision of this Court in the *Lukens* case as to the lack of standing to sue and provide for judicial review of the Secretary's wage determinations. Why, in particular, did it pinpoint the "locality" and "open market" questions?

The legislative history of the so-called Fulbright amendment supplies the answer. Properly speaking, that history goes back to January, 1937, when Secretary of Labor Perkins, in the very first minimum wage determination under

the Walsh-Healey Act, made an industry-wide finding as to the prevailing minimum wage in the men's work clothing industry.[1] Through the years that followed, Secretary after Secretary continued the practice of making wage determinations on an industry-wide basis wherever examination of the facts in the particular industry indicated that this was appropriate.[2]

This practice was public and notorious. It was well known to Congress. In addition to the Secretary's annual reports to Congress, which set forth the specific determinations made, there were innumerable legislative hearings in which the Secretary's practice was made known.[3] And, since this Court's decision in the *Lukens* case in 1940, it has been clear that Congress, and Congress alone, had the power to correct any misconstruction of his authority by the Secretary.

During this period there were, naturally, some who objected to the Secretary's practice, and there were numerous recommendations for legislation to amend the Act so as to prevent the continuation of this practice.

But Congress took no action on any of the suggested amendments of the Act until 1952. At that time, the administrative proceedings in this very case were already pending and known to Congress. Although a hearing had not yet been held, the petition of the Textile Workers Union of America had been filed and note of it was made on the floor of the Senate.[4]

Whether or not in response to this particular administrative proceeding, Senator Fulbright in the spring of 1952

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[1] Wage Determination for Men's Work Clothing Industry, 2 F. R. 233 (February 4, 1937).

[2] 41 CFR Parts 202 *et seq.*

[3] See, e.g., H. Rept. 2608 on H.R. 6449, 75th Cong., 3d Sess. (1938), Hearings before Senate Committee on Education and Labor, 76th Cong., 1st Sess. (1939) pp. 95, 105.

[4] 98 Cong. Rec. 3258 (1952).

proposed to amend the Walsh-Healey Act by inserting provisions in a bill then before the Congress to amend and extend the Defense Production Act of 1950.[5] Three separate amendments to the Walsh-Healey Act were proposed. The first would have statutorily reversed the administrative interpretation of the "locality" provision. The second would have changed the language of the open-market exemption. The third would have made the determination procedure subject to the provisions of the Administrative Procedure Act.

In his formal statement introducing these amendments, Senator Fulbright noted that the first—relating to the locality question in issue in this case—would require a change in the existing administrative interpretation of the Act. He then made no charge, however, that the administrative interpretation was contrary to the statute or that the change was necessary to accomplish the original Congressional intention.[6] Instead, he argued that the existing and accepted practice of the Secretary was socially and economically undesirable. In sharp contrast to such reasons, he did charge, with respect to the second amendment—relating to the "open-market" exemption—that the Secretary of Labor had in effect rewritten the exemption, contrary to the Congressional intention, and that the proposed amendment was therefore necessary to correct the misinterpretation.[7]

The Senate Banking and Currency Committee which

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[5] 98 Cong. Rec. 4128 (1952).

[6] In the hearings which subsequently took place Senator Fulbright did make the contention, now made here by petitioners, that the original Congressional intention was to require determinations to be limited to local communities, although he seemed to say that they should be based not on a particular industry but on "industries operating in the locality" in which the contract is to be performed. Hearings before the Senate on Banking and Currency on S. 2594 and S. 2645, 82d Cong., 2d Sess. (1952) pp. 2603, 2705. Other Senators disagreed, of course, *id.* at 2618, 2642.

[7] 98 Cong. Rec. 4128.

considered these amendments rejected the first proposed amendment, relating to the "locality" question. It did, however, recommend the other two amendments and included them in the bill which it reported on May 27, 1952, with three northern Democratic Senators objecting to the "open-market" change.[8]

When the matter came to the Senate floor, however, there was opposition even to these two proposals. A group of new England Republican Senators proposed to offer on the floor an amendment to the reported bill which would eliminate all of the proposed changes in the Walsh-Healey Act.[9]

The legislative situation thus posed was a difficult one. The Korean war was in progress and the amendments to the Walsh-Healey Act had been interjected, in the Senate only, into the consideration of the Defense Production Act, emergency legislation which, if not extended, would expire on June 30, 1952.[11] The divisions among the Senators as to the Walsh-Healey Act crossed party lines and tended to divide both parties in the spring of a Presidential year. As often happens in such a situation, it seemed desirable to the proponents of change to find a face-saving method of avoiding a division on these difficult issues. Such a solution was found.

Senator Fulbright, and those who supported a change in the substance of the Walsh-Healey Act, agreed to withdraw their changes. (Actually, at the time this agreement was reached, the only substantive change in the bill before the Senate concerned the open-market exemption. The amendment on the locality question had been lost in Committee, with Senator Fulbright's apparent concurrence.) In return, the New England Senators who opposed any change in the Walsh-Healey Act agreed to a provision making determinations subject to the Administrative Procedure

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[8] Senate Report No. 1599 on S. 2594, 82d Cong., 2d Sess.
[9] 98 Cong. Rec. 6336.
[11] Senate Report No. 1599 on S. 2594, 82d Cong., 2d Sess., p. 36.

Act and subject to review at the behest of any aggrieved person—who was "deemed" by the compromise to include every manufacturer in an industry in which a determination was made. They agreed also to a newly written specific provision making it clear that, even after contracts were executed containing the prescribed stipulations, the Courts could review not only the open-market question but also the locality question and any other legal issues that might appear.[12] On this basis, the compromise substitute was adopted unanimously by the Senate [13] and was subsequently agreed to by the House conferees.[14]

Congress, in sum, was fully advised and informed as to the consistent administrative action which its agent, the Secretary of Labor, had taken in administering the Government's program with respect to procurement. It was proposed by some that Congress, as the principal, revise its instructions to its agent, in two respects: (1) The Secretary's authority to base his minimum wage findings on industry-wide data, and (2) the scope of the exemption from the Act of "open-market" purchases. Congress refused to make either change. Instead, it made the question of whether its agent had properly complied with his instructions subject to judicial review. It thereby transferred to the federal courts the burden of deciding questions which the proponents of change in the administration of the Act were afraid to bring to a vote in the Congress.

As Senator Fulbright said of the compromise which was enacted:

> ". . . any other approach, it seems to me, would have involved a long and difficult and uncertain controversy, which might not have been successful. But when this

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[12] 98 Cong. Rec. 6529-6530.

[13] 98 Cong. Rec. 6531.

[14] House Conference Report No. 2352, 82d Cong., 2d Sess., pp. 27-28.

approach was suggested, it seemed to me wiser to follow it. After it has had an opportunity to work, if the courts do not interpret it in the way Congress thinks they should, we of course, would have an opportunity to change the basic law." 98 Cong. Rec. 6531.

The present case arises as a direct consequence of this decision to pass the buck to the Federal courts. The administrative proceeding involved was pending when the Fulbright amendment was before Congress and was the first one concluded after its passage. Involved in the law suit are substantially all of the major manufacturers of cotton, silk, and synthetic textiles. The southern manufacturers, many of whom in fact pay minimum wages in excess of $1.00, accepted the Congressional invitation to be "deemed" persons aggrieved and joined together as plaintiffs; the northern manufacturers intervened as defendants. The major union in the industry also joined as a defendant. All of the parties having an economic interest in the matter have, thus, transferred their controversy from Congress to the Federal courts.

That this is an undesirable result is, we think, plain. But, assuming the constitutionality of the Fulbright amendment (a point we touch on below) the courts below were required to hear the case. This Court is not. Review in this Court is a matter of discretion and, we submit, that discretion should be exercised to deny further hearing in a case of this nature.

The Court of Appeals has declined to reverse the administrative interpretation which Congress, with full awareness of the facts, itself refused to overrule. This Court should terminate the matter right there by denying further review. Any other course would place upon this Court the burden of deciding a question which Congress not only has power to decide, but which we believe Congress also has the duty to decide—either by refusal to amend the act, as in

the past, or by a change in the terms of the statute. This Court should not place itself in the position of rescuing the objectives of those who desired amendment of the statute but did not have the votes in Congress to achieve that amendment. Nor, we believe, should it even enter the controversy in the absence of any Congressional mandate that it do so.

II. THE DECISION BELOW IS CLEARLY CORRECT

Even if we ignore the obvious attempt to obtain through litigation a result which Congress refused to enact, the decision below is clearly correct.

The arguments against that decision—the best of which are set out in the petition for certiorari—miss the essential point because they misstate the issue. According to petitioners, the question is whether the Walsh-Healey Act gives the Secretary the power to find a "single and uniform Nation-wide standard . . . for [the] entire industry or . . . the wage standards . . . prevailing in their respective localities." This is *not* the question. We concede that if the Secretary were to make findings on a community basis, covering all of the industries in a given area, he would be restricted by the "locality" language of the Act. He would be required, in the words of the statute, to make a finding as to the prevailing minimum wage in the "groups of industries currently operating in the locality." But the Secretary is also given authority to make findings as to the minimum wage paid to persons "employed on similar work" or paid in the "particular industry." The question is whether, if he chooses to proceed in that fashion, he is also required to make his findings for similar work or for a particular industry on a locality-by-locality basis.

The question, in short, is not whether Congress intended to require a manufacturer to come up to national wage standards or community wage standards. If the Secretary chose to proceed on a geographical rather than an industry

basis, the answer is clearly the latter. That is, if he chose to make a finding as to the prevailing minimum wage in an area, either for all industry or specified groups of industries, and as a result all government contracts, or contracts in the industries covered, would require that all workers in that particular area be paid the specified minimum, then the finding would have to be limited to the "locality." But the Secretary has not proceeded in that way here. Here the question is whether, in exercising the alternative power to proceed on a single industry basis, the Secretary is required to set standards for that industry on the basis of wages paid in that industry generally or the wages paid *in that industry* in each local community.

The distinction is of tremendous importance because the wage differentials between different industries are very often larger than differentials between geographical areas within the same industry. For example, as of the date of the hearings herein, the prevailing minimum wage for this particular industry was found to be $1.00 per hour, when all the plants, both in the high and low wage sections of the country, were considered. The minimum wage in New England actually was higher than this prevailing minimum: $1.13½. But the difference between the two was much smaller than the difference between minimum textile wages and minimum steel wages, even in the same areas. The uniform minimum wage in the basic steel industry on the date of the hearings herein—in Alabama as well as Pennsylvania—was $1.43½. (It is now $1.69½.) The difference between wages paid in the high and low wage areas of this industry were thus substantially smaller than the difference between the wages paid in this industry and the wages paid in the steel industry in the same "locality."

Under the Act, as construed by the Secretary, a prevailing wage finding could be made either on a single industry basis or on a community basis. What the petitioners contend for is neither. They do not ask for a local community

standard—including wages paid in other industries such as steel—but a standard limited both by industry *and* by geography. And they insist that this kind of standard is the only kind of standard which the Secretary is permitted to use in making single industry or similar work determinations.

In support of this contention they rely primarily upon a "legislative history" distilled primarily from casual comments made by individual members of Congress while the bill was on the House floor. Once the distinction between community standards and industry standards is seen, however, most of these comments are quite consistent with the Secretary's interpretation of the Act. All but one of the remarks quoted refer to prevailing wages in the community, presumably meaning the prevailing minimum for all or groups of industries in the community. They do not exclude the possibility that the Secretary could also proceed not by finding community levels for all industry but national levels for a particular industry. At most they show that in finding general levels the Secretary was restricted to local communities. That this is a proper construction of these remarks is shown by the very statement of Congressman Healey—one of the authors of the bill—upon which petitioners so strongly rely. He clearly indicated that the community approach was only one of alternative standards. As he put it, the standard set by the bill was:

> "the prevailing minimum wage *for similar work or in the industries operating in the locality . . .*"[15]

The casual statements on the floor of the House by other Congressmen referring to community wage standards are balanced by other statements which affirmatively support the Secretary's position. Thus, Representative Citron, whose statement about community wage standards is relied upon by petitioners, also said, in the very same speech, that "the opposition to this measure . . . comes from Southern man-

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[15] 80 Cong. Rec. 10002, quoted at p. 16 of the petition herein.

ufacturers who would be forced to raise their labor standards" [16] and that the bill was necessary to prevent unfair competition from firms moving to "sections where they can take advantage of low standard wages." [17]

The plain fact is that the language of this statute is ambiguous and its legislative history unclear. What is clear is that if it is construed as suggested by petitioners it would, first of all, be incapable of administration. Hundreds of separate community minima for each industry would have to be found, after notice and hearing and, presumably, revised at each change in wage levels. And even if it were possible to accomplish this, the only effect would be to punish those whom Congress meant to protect and encourage an economic movement which Congress meant to impede.

As the Court of Appeals correctly pointed out, the only effect of an act so administered would be freeze the wage costs of producers in high wage areas and offer an inducement for government suppliers to move their shops to less industrialized communities having lower wage levels. indeed, as construed by petitioners, the Act would reward most the producer who moved his plant to a community where there was no textile mill. Whatever wage he chose to pay would be prevailing textile wage for that "locality."

There is no evidence that Congress intended to set up any such system of incentives. To the contrary, deterrence of the "runaway shop" movement was one of the prime considerations in the enactment of the bill. As Senator Walsh said, in supporting the bill before the House Committee:

> "The boot and shoe industry is being wiped out in the boot and shoe centers of Massachusetts . . . They are moving up to New Hampshire; they are moving up to Maine; they are moving into rural parts of my own

[16] 80 Cong. Rec. 10008.

[17] 80 Cong. Rec. 10009.

> State and paying one-half the wages that are paid in localities where the labor organizations have been able to demand and exact a living wage." (Hearings before the House Judiciary Committee on S. 3055, 74th Cong., 1st Sess. p. 117)

Or, as the Commissioner of Labor Statistics said, an example showing the need for legislation was a case of:

> ". . . a union firm breaking its contract with the union, shutting down its plant, going to a State something like a thousand miles away, opening up a new plant under much lower conditions than normal standards, and getting a contract with the Federal Government, because under the law it was the lowest bidder and therefore could get the order." *Id,* at p. 13.

The effects described by Senator Walsh and Dr. Lubin would, of course, take place only in an industry in which competition was nation-wide and variations in wage rates paid were an important competitive factor—i.e., in an industry like the textile industry. But, in such industries, the act which Congress passed to limit the incentive for runaway shops would have the absurd effect of encouraging them, if the petitioner's construction of the Act is correct. Surely the courts should affirmatively require the government's purchasing agencies to adopt such a construction, irrespective of the facts, only on a showing in the clearest possible terms that Congress so intended. And no such showing is here made either by reference to the words of the statute or by selecting isolated words uttered by a few Congressmen in floor debate, particularly where the intention sought to be shown by those selected quotations is contradicted by other statements of the sponsors of the legislation, Senator Walsh and Representative Healey.

III. THERE IS NO CONFLICT

The petition does not claim any conflict of circuits or, indeed, any conflict between the decision of the Court of Appeals and any decision of this Court. Much is made of the fact that several District Judges in the District of Columbia, had, prior to the decision of the Court of Appeals, come to a different conclusion than that ultimately reached by the Court of Appeals. But this, surely, was to be expected in view of the prior opinion of the Court of Appeals in the *Lukens* case. The matter is now settled in the District of Columbia Circuit and the decisions of all courts in the Circuit will presumably conform to the mandate of the Court of Appeals in this case.

Nor is conflict between the circuits likely to arise. Certainly there will be no future controversy about the $1.00 minimum wage in view of the increase in the minimum wage for all industries affecting commerce to $1.00 per hour. And determinations for other industries will continue to be tested in the District of Columbia Circuit since—as petitioners correctly point out—the Secretary of Labor may be sued only in the courts of the District of Columbia.

The result is that if this Court denies certiorari this matter will be at rest. Or, more precisely, the matter will be precisely where it was when Senator Fulbright abandoned his effort to change the substantive law and instead, sought to achieve a reversal of existing practice by referring the matter to the courts. As he said then, if the interpretation is not what Congress thinks it should be, "we of course, would have an opportunity to change the basic law."

IV. DENIAL OF CERTIORARI WILL AVOID DECISION ON A CONSTITUTIONAL ISSUE NOT PASSED ON BY THE COURTS BELOW.

The petitioners here are 158 separate companies who have joined in this suit pursuant to the provision in the so-called Fulbright Amendment which says that review of wage deter-

minations under the Walsh-Healey Act may be had by any person adversely affected or aggrieved thereby

> "who shall be deemed to include any manufacturer of, or regular dealer in materials, supplies, articles or equipment purchases or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable."

This statute, upon which jurisdiction here is based, contains no requirement that the plaintiff actually be adversely affected. That is to say, it does not require that he be a manufacturer who pays wages lower than the prevailing minimum found by the Secretary, or that he is a manufacturer who has in the past or will in the future enter into contracts for the sale of materials to the Government. Indeed, even as to manufacturers who would meet such unspecified requirements, there would be no legal aggrievement or adverse effect since, as this Court has said in the *Lukens* case, they can have no legal interest in the terms under which the purchasing agents of the Government will permit goods to be sold to it.

It would seem plain, therefore, that there is implicit in this case a serious constitutional question as to whether the grant of jurisdiction contained in the Fulbright Amendment is consonant with the requirements of Article III of the Constitution. This question is a two-fold one. First, there is the question, in the words of the Court of Appeals, in another case under the same statute, of "whether Congress may constitutionally redefine as a case or controversy under Article III a dispute which the Supreme Court has held not to be such a case or controversy." *Textile Workers Union of America* v. *Allendale Co.*, 226 F. 2d 765, 767 (D.C. Cir., 1955).

Second, there is the question of whether Congress can grant jurisdiction without limiting such jurisdiction to the

cases in which some more or less direct economic aggrievement can be shown by the plaintiffs.

With respect to the first question, this Court has said that "a wage determination by the Secretary contemplates no controversy between parties and no fixing of private rates; the process of arriving at a wage determination contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept. . . . Judicial restraint of those who administer the Government's purchasing would constitute . . . a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the Administration of another branch of government." *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 at 127-128. This language surely seems to intimate that the lack of judicial power to interfere with the administration of the Government's purchasing operations is based not only on a lack of Congressional authorization for such interference, but on the basic separation of powers provided for in the Constitution. Indeed, this Court said almost that when it said in the *Lukens* case, that it rested its conclusion that the plaintiffs lacked standing

> "upon reasons deeply rooted in the constitutional divisions of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public." 310 U.S. at 132.

Even if it be assumed that Congress could create a litigable controversy where this Court has found none to exist, there remains the second question as to whether it can issue a grant of jurisdiction in the particular terms of the Fulbright amendment. Certainly it seems to us far fetched to argue that there is a case or controversy in the constitutional sense between the Secretary of Labor and a manufacturer who has never done Government work and who is under contract with the union to pay wages in excess of the minimum which,

if the Secretary's order is valid, will be specified as the minimum wage to be paid in work performed for the government. Yet the Fulbright amendment would appear to grant jurisdiction over just such a case.

We advise this Court of the existence of these constitutional issues with some diffidence, since we did not press argument on them in the courts below in this case, and there has been no decision on them. But, they do go to the jurisdiction of this Court to hear the case, although not necessarily to the jurisdiction of the District of Columbia courts.[18] We therefore feel under an obligation to point out to the Court that a question as to jurisdiction does exist which was not argued or decided in either of the courts below.[19]

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[18] Federal Radio Commission v. General Electric Co., 281 U. S. 464.

[19] This Court is, we think, entitled to a full explanation of our failure to press this jurisdictional question in the courts below. In the District Court, we did, in the proposed answer which we attached to our motion to intervene, set forth our contention that the Fulbright Amendment is unconstitutional. Our intervention, however, was opposed by the plaintiffs. And one of the grounds for the opposition was "the familiar ground that an intervenor has no right to challenge the jurisdiction of the Court . . . *Fink* v. *Oliver Mining Co.* [65 F. Supp. 316 (D. Minn. 1941)]".

Despite the opposition, our motion to intervene was granted. Subsequently, however, and while this case was still pending in the District Court, a similar suit was instituted to set aside the Secretary of Labor's determination as to the prevailing minimum wage in the woolen and worsted industry. *Allendale Co.* v. *Mitchell,* now pending in the Court of Appeals for the District of Columbia Circuit. We filed a motion to intervene in that case similar to that filed in the present case.

In Allendale, however, our motion, as well as a motion by a manufacturer who sought to intervene on the side of the Secretary, was denied in the District Court. We appealed that denial. But, until the appeal was decided, we did not judge it appropriate to jeopardize our now uncertain status as an intervenor by pressing the constitutional point which we had pleaded in our answer.

While the appeal on the intervention question was pending in the Court of Appeals in the Allendale case, the present case was argued and decided in the District Court and argued in the Court of Appeals.

It is our position that, irrespective of these constitutional issues, this Court should deny certiorari, for the reasons earlier stated. But the Court may feel that the fact that the case does contain a constitutional issue as to jurisdiction, which has not been refined by the process of briefing, argument and decision in the courts below, and as to which it does not have the opinion of the Court of Appeals, is an additional reason for denying certiorari.

The decision of the Court of Appeals in this case is not a decision upholding the constitutionality of the Fulbright Amendment, even *sub silentio,* since the Court found the

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Finally, on July 14, 1955, the Court of Appeals *en banc,* after reargument, rendered a 4-3 decision reversing the order of the District Court which had denied the motion to intervene. *Textile Workers Union of America* v. *Allendale Co.,* 226 F. 2d 765. In addition to deciding that the District Court erred in denying the motions to intervene, the Court of Appeals noted the existence of the constitutional issue as to jurisdiction. That issue, it said, would probably be determined in the main suit. But, it continued, "unless and until the trial court decides that this litigation is beyond the judicial power, both appellants should be permitted to intervene."

In accordance with this decision, we promptly and vigorously pressed our constitutional objection in the only forum then remaining open to us. The instant case already had been argued in the Court of Appeals. The *Allendale* case, however, was still pending in the District Court. After being admitted to intervention in that case on remand from the Court of Appeals, we filed a motion to dismiss on the ground that the statute upon which jurisdiction was based was unconstitutional. We filed a memorandum and presented oral argument in support of that motion and it was considered by Judge Youngdahl in the District Court at the same time as cross motions for summary judgment which had also been filed by the parties.

On February 10, 1956, Judge Youngdahl overruled our motion to dismiss and, at the same time, found generally for the defendants on the merits. The plaintiffs have appealed the judgment on the merits to the Court of Appeals. *Allendale Co.* v. *Mitchell,* No. 13,187. We have appealed the denial of our motion to dismiss. *Textile Workers Union of America* v. *Allendale Co.,* No. 13,190. Both appeals are now pending in the court of Appeals. We intend, when the case is heard in that Court, to press our appeal and thus to obtain an adjudication by the Court of Appeals of the constitutional issue which that Court pointedly noted in the earlier appeal in the same case.

plaintiffs had no case on the merits and thus was not compelled to decide the jurisdictional question *sua sponte* (despite its express notice of the issue in its earlier decision in the *Allendale* case). Cf. *Huffman* v. *Ford Motor Co.*, 345 U.S. 330. But if certiorari is granted by this Court we feel that our responsibility as counsel and to the Court will require us to press the issue here and thus present it to this Court for decision.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this Court should deny the petition for certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 682

COVINGTON MILLS, ALABAMA MILLS, INC., ET AL., PETITIONERS

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT SECRETARY OF LABOR IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 129 F. Supp. 740. The opinion of the United States Court of Appeals is not yet officially reported

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1955. A petition for rehearing *in banc* was denied on January 11, 1956. The petition for a writ of certiorari was filed on

February 11, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the terms and meaning of the wage determination provisions of the Public Contracts Act so plainly prohibit the Secretary of Labor from determining a single industry-wide prevailing minimum wage as to warrant judicial repudiation of the consistent and longstanding administrative practice which Congress has accepted throughout the years since the enactment of the Act in 1936.[1]

STATUTES INVOLVED

The pertinent provisions of the Walsh-Healey Public Contracts Act of 1936, 49 Stat. 2036, *et seq.* (41 U. S. C. 35, *et seq.*), as amended by the Fulbright Amendment of June 30, 1952, 66 Stat. 308 (41 U. S. C. 43a), are printed in the petition for a writ of certiorari (Pet. 3–5).

STATEMENT

The following facts, which are either omitted from or inadequately presented in petitioners' "Statement of the Case," are, we believe, most significant in determining whether certiorari should be granted or denied.

[1] Although the petition includes questions relating to a variety of other grounds for its assertion of invalidity of the wage determination, it seems evident that this is the only question seriously urged as warranting certiorari. No reasons are advanced in the petition for granting certiorari on any of the other questions.

1. These two actions were brought against the Secretary of Labor by two different groups of textile manufacturers, the complaint in the *Covington* case having been filed on January 19, 1953, and in the *Alabama* case on February 16, 1953. Both actions, relying on the 1952 amendment (generally known as the "Fulbright Amendment") to the Walsh-Healey Public Contracts Act, sought a declaratory judgment that the Secretary's wage determination for the textile industry was illegal and void and also sought injunctive relief to prevent the determination from becoming effective. There are a total of 158 plaintiffs in the two cases,[2] six in the *Covington* case and 152 in the *Alabama* case.

The Secretary of Labor moved to dismiss as to all of the plaintiffs in the *Covington* case and as to all except 14 in the *Alabama* case, on the ground that they did not meet the requirements for standing to sue under the Fulbright Amendment. At the same time, the Secretary moved for summary judgment on the merits against the remaining 14 plaintiffs and against any other plaintiffs as to whom the motion to dismiss should be denied. Plaintiffs cross-moved for summary judgment.

The District Court found it unnecessary to rule on defendant's motion to dismiss; it denied defendant's motion for summary judgment and

[2] There were 210 at one time, but 52 were dismissed without objection for various reasons at various times.

granted plaintiffs', solely on the ground that the Secretary lacked statutory authority to make a single wage determination applicable to an entire industry or branch of the industry. The injunctive relief requested was granted, the bonds filed in connection with previously issued preliminary injunctions being continued pending appeal. The judgment of the District Court was entered on April 7, 1955. Notices of appeal were filed on April 18, 1955, and on motion by the Secretary of Labor to consolidate and to advance the appeals because of the importance of an early determination, the appeals were consolidated and heard on June 29, 1955.

The Court of Appeals reversed the judgment of the District Court on December 1, 1955. It held (Chief Judge Edgerton and Judge Danaher, with Judge Washington dissenting): (1) that the District Court was in error in not ruling upon the Secretary's motion to dismiss since the fact that some of the plaintiffs admittedly had standing to sue would not confer standing on others, and (2) that the wage determination was valid in all respects (Pet. App. A, 2 *et seq.*). The court remanded the case with instructions that the District Court decide which plaintiffs have standing, unless the Government should withdraw the motion to dismiss or unless the plaintiffs concerned consented to it, and ordered judgment entered on the merits against plaintiffs who were not dismissed (*id.*, p. 7). Thus, the standing to sue of

144 of the plaintiffs, which includes *all* of the plaintiffs in the *Covington* case and all except 14 in the *Alabama* case, has not yet been determined by either court below.

Petitioners filed a timely petition for rehearing *in banc*. This was opposed by the Government on the grounds that the decision of the majority of the court which heard the case was plainly correct, and that further delay in the final resolution of this litigation would seriously prejudice the public interest in the orderly administration of the Government's wage determination program for its purchasing functions, which already had been made virtually ineffective for the textile industry for a period of almost three years because of the injunctions issued by the District Court. The petition for rehearing *in banc* was denied on January 11, 1956, with Judges Miller and Bastian dissenting.

2. The wage determination here in question was made by the Secretary of Labor on January 15, 1953, to be effective February 21, 1953 (18 F. R. 471). It determined that the prevailing minimum wage for the branch of the textile industry as defined in the order was not less than $1.00 per hour. Like three previous wage determinations for this industry, which had been in effect for a total of more than eleven years (6 F. R. 5852, effective December 17, 1941; amended 7 F. R. 3943, effective June 24, 1942; amended

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13 F. R. 6083, effective November 10, 1948, and still in effect at present), this determination prescribed a single industry-wide minimum wage. Its effect, like that of the previous wage determinations, was to require that at least the prescribed minimum rate be paid to able-bodied experienced employees producing textile products to fill large Government contracts.

The present determination was made by the Secretary of Labor on the basis of administrative hearings held in September 1952. The evidence and argument filled nine volumes. The subject matter of the administrative proceedings centered primarily around two questions: (1) whether a determination of a single minimum rate for the whole branch of the industry would be proper, and (2) the amount of the prevailing minimum wage.

The facts bearing on the main question presented by the petition for certiorari—*i. e.* the Secretary's statutory authority to determine an industry-wide minimum wage—are summarized in the Secretary's Notice of Proposed Amendment (R. 27–32). The undisputed evidence before the Secretary showed that the competitive and marketing characteristics in this industry, with respect both to Government purchases and ordinary commercial business, are clearly on a national, rather than regional, scale. Competition in the industry is nationwide in scope and marketing of the products of the industry is sim-

ilarly on a national scale. Only in rare instances is there found a situation where a mill markets its product within a limited geographic area. Most textile producers maintain sales representatives or agents in the textile center known as Worth Street in New York City and the vast bulk of textiles are sold through such center. Producers of textiles in such widely separated areas as Maine and Alabama compete for the same business in the Worth Street market. It is not uncommon for mills in different sections of the country to perform different production operations on a given lot of textile fabric. For example, textile gray goods woven in South Carolina may be shipped to New Jersey or Rhode Island for finishing operations consisting of bleaching, dyeing, printing, etc. The goods are then sold on the New York market and may be shipped to customers in Maine, California, Florida or any other place in the United States, or elsewhere in the world.

Government purchases of textiles are not confined within any geographic limits. In the normal case, the Government invites bids from firms located in every textile producing area and bids are received from mills in widely separated regions. Pursuant to a single invitation to bid, contracts for a particular item may be awarded to mills in a number of different States. In some instances, various steps in the processing of textiles required under a Government contract will

take place in different States and different regions. A single firm bidding on Government contracts will frequently be found to have a number of different mills located in different States or areas. In no instance, is it possible for a Government contracting agency to have any knowledge of the locus of production prior to receipt of bids and award of contracts. In other words, there is no way of ascertaining in advance where a proposed Government textile award may be carried out.

On the basis of these facts, the Secretary concluded that the basic statutory purposes—"to prevent the flow of Government business into the hands of firms that pay substandard wages and maintain low employment standards" and to promote "a situation where employers paying fair and reasonable wages would not lose out on Government business to low paying firms" (R. 28–29)—required a uniform industry-wide prevailing minimum wage determination. This conclusion was premised on the Secretary's interpretation of the statutory language as authorizing "three distinct standards" for determining prevailing minimum wages, the first two of which are not qualified by any geographic limitation, and even if qualified by the "locality" language permit wide latitude in determining the geographic area (R. 29–30, 31–32). In his findings on the proposed determination, the Secretary pointed out that his construction rested upon the

specific statutory language construed with the Congressional purpose in mind, and that "any construction of the locality language which would result in freezing the lows and highs in wages would certainly not carry out the purpose of the Act. In other words, if the dominant plant or plants in community A were paying substantially lower wages than plants in community B, the recognition of community A and community B as separate localities would mean that plants in A could continue to underbid plants in B and the situation would be frozen at that level" (R. 23).

The Secretary, therefore, rested his wage determination for this industry on the first and second alternative standards (*i. e.*, "similar work" and "the particular or similar industries"), pointing out that, even if the "locality" language were construed as applicable to these two standards, the statutory purpose would require the finding "that the locality in which the products of the textile industry are to be manufactured or furnished under Government contracts is coextensive with the entire area in which the industry operates"; that since the enactment of the Public Contracts Act most of the wage determinations issued thereunder had recognized a single industry-wide minimum wage, and in each of the three previous wage determinations for the textile industry this had been done; that Congress over a period of 16 years had not altered the statutory language nor changed the

administrative construction despite repeated requests; and that it seemed "reasonable to assume that if this construction of the Act did not comport with the Congressional intent Congress would have acted to alter the construction" (R. 32).

3. On February 19, 1953, that is, three days after the filing of the complaint in the *Alabama* case, the District Court granted preliminary injunctions staying the effect of the wage determination with respect to all of the plaintiffs in both cases, requiring that a bond be posted by each plaintiff who thereafter entered into a contract which would otherwise be subject to the wage determination. The injunctions issued by the District Court at the time of its decision on the merits, together with the bonds, remain in effect pending final disposition of this litigation, the Court of Appeals having granted a stay of its judgment to permit the filing of a petition for a writ of certiorari. Thus, the wage determination program in this industry has been virtually ineffective now for over three years by reason of the injunctions issued in these cases.

ARGUMENT

The question of the statutory authority of the Secretary of Labor to make wage determinations of the type here involved is unquestionably one of national importance. However, we believe that the decision of the Court of Appeals, up-

holding the longstanding administrative practice under the Public Contracts Act, which Congress has accepted and declined to change through the years, is so clearly correct that review by this Court is neither necessary nor advisable. Admittedly, the decision is not in conflict with that of any other Court of Appeals.[3] And the "divergence of judicial opinion" in the District of Columbia, on which petitioners rely, does not present any problem which is not conclusively resolved by well-settled principles of statutory construction and by this Court's decisions construing the purposes of the Public Contracts Act.

Therefore, because important public interests will best be served by the most expeditious possible termination of this litigation and without the further substantial delay that a grant of certiorari would necessarily entail, we oppose certiorari.

1. The decision by the court below is clearly correct. That decision is, at the very least, con-

[3] Although, as the petition points out (Pet. 5, 10), suits against the Secretary for judicial review under Section 10 (b) of the Fulbright Amendment can be brought only in the District of Columbia, the question here presented could be raised in other circuits under Section 10 (c) of the Fulbright Amendment (see Pet. 4–5) which authorizes any contractor to raise this particular and other legal issues as defenses to any enforcement action brought against him, and such enforcement actions may be brought in any jurisdiction in which the alleged violations of the contract have occurred. Thus, a conflict among the circuit courts could develop, which might then present a more appropriate occasion for granting certiorari.

sistent with the literal terms of the statute; and, more importantly, the construction upheld below is not only required by the purposes of the Act as a whole, but is supported by the long and consistent administrative practice which Congress has accepted, and declined to repudiate, through the years. These considerations are especially controlling in any judicial review under the Public Contracts Act which regulates only Government, not private, business. They so manifestly compel the decision reached below as to nullify the significance that might otherwise be inferred from the superficial showing in the petition of "divergence of judicial opinion" (Pet. 10–11).[4] It is evident, moreover, that these divergent views are predicated solely on the no longer sound reasoning of the majority decision of the Court of Appeals, rendered more than 16 years ago, in *Lukens Steel Co.* v. *Perkins,* 107 F. 2d 627, reversed, 310 U. S. 113. While this Court's reversal did not rule on the merits of the statutory construction issue, the appellate court's then narrow conception of the nature and purposes of this legislation, which obviously influenced its

[4] This "divergence" is exaggerated by petitioners. They assert that six judges who have considered the merits of the question have rejected the position of the majority decision below (Pet. 11). To reach the number "six," petitioners have included District Judges Tamm and Schweinhaut, neither of whom considered the merits of the question but ruled only on the motion for preliminary injunction and admittedly expressed only a tentative "off the cuff" view of the merits.

restrictive construction of the "locality" language, is plainly inconsistent with this Court's decision in the *Lukens Steel* case as well as with its subsequent decision in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, discussed *infra,* pp. 14–15, 16–17. And the view expressed by the appellate court in *Lukens Steel* was also rendered without benefit of the long subsequent history of administrative practice and legislative approval.

Contrary to the view of the dissenting judge below that the statutory language is "clear on its face" (see Pet. App. A, 13), it is evident that the literal statutory language conveys no such "plain meaning." As pointed out in the careful analysis of the language in the majority opinion below, certainly "[i]t is not plain that every minimum wage determination under the Act must be limited to a 'locality' " (Pet App. A, 4), or that the language forbids the Secretary to make an industry-wide wage determination. The most that can be said against the Secretary's interpretation is that the language is ambiguous and could be read differently. But certainly it is not incumbent on the courts to reject a long-standing administrative construction—discussed *infra,* pp. 22–28—simply because the statutory language may be susceptible to some other construction, particularly where, as in the instant case, the other construction would lead "to absurd or futile results" "plainly at variance with the policy of the legislation as a whole."

United States v. *American Trucking Assns.*, 310 U. S. 534, 543; see also *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 617. On the contrary, established principles of statutory construction plainly require that ambiguity in particular sections of an Act be resolved by "appraisal of the [legislative] purposes as a whole" and in favor of the administrative construction which has been long-continued with legislative acquiescence. *United States* v. *American Trucking Assns., id.* at 544; *Brooks* v. *Dewar*, 313 U. S. 354, 361; *Alstate Construction Company* v. *Durkin*, 345 U. S. 13, 17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270.

The principles of these decisions take on particular significance when viewed in the context of this Court's analysis of the Public Contracts Act in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. The Court there repeatedly emphasized the unique character of this Act as one dealing solely with the Government's "own internal affairs" "for the purpose of keeping its own house in order"—the purchasing of its own supplies—unlike the "many cases involving contested Government regulation of the conduct of private business" (310 U. S. 113, at 127, 129). Although the decision rested on the standing-to-sue issue, its reasoning has plain implications bearing on the merits of the statutory construction question and on the limited judicial function in reviewing administrative interpretations and practices

under this Act. The terms and conditions for the purchasing of Government supplies, said the Court, and specifically the making of wage determinations for Government contracts, are peculiarly "executive and legislative" matters requiring adherence to "the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers" (310 U. S. at 127, 129):

> * * * Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law." Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government [310 U. S. 113 at 127–128].

The *Lukens* decision rested expressly, not merely on the absence of a statutory right of judicial review, but on the principle of "judicial restraint" in reviewing administrative interpretations of this Act and upon "reasons deeply rooted in the constitutional divisions of authority in our system of Government" (*id.* at 132). There is thus particularly compelling reason for

the conclusion below that the court should "decline to repudiate an administrative interpretation of the Act which Congress refused to repudiate after being repeatedly urged to do so." *Allstate,* 345 U. S. at 17.

Even if the statute were an ordinary one regulating private rather than only internal Government affairs, the administrative interpretation here must prevail under settled principles of statutory construction, for it is the reading most consistent with the context and purposes of the Act as a whole, while the construction advanced by petitioners would defeat rather than promote the statutory purposes. As stated by the court below, "The policy and purpose of the Act are plain". The committee reporting the bill stated that its aim was to "end the present paradoxical and unfair situation in which the Government, on the one hand, urges employers to maintain and uphold fair wage standards and, on the other hand, gives vast orders for supplies and construction to the lowest bidder, often a contractor or manufacturer who does not sympathize with and fights hardest against labor and social welfare policies". Sen. Rep. 1193, 74th Cong., 1st Sess., p. 1.

This Court, in its two decisions relating to this Act, has declared that its purposes are "to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and of-

fending fair social standards of employment" (*Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, at 128) and "to use the leverage of the Government's immense purchasing power to raise labor standards" (*Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 at 507). And there is no doubt that these purposes were directed specifically to the depressant wage levels and the "runaway" plant problem in the textile industry, among others, in particular.[5]

The most cursory examination of the problem of the depressant effect of the low wage bidder's competitive advantage demonstrates the impossibility of combatting it by the establishment of a separate prevailing wage standard for each of the numerous "communities" or "local centers of manufacture" in which the plants of a particular industry are located. Such a determination would place the stamp of approval on substandard rates and would not only perpetuate them in the plants where they exist but would encourage their spread

[5] See, for example, statement of Representative Citron (of Connecticut) stating as his reason for supporting the legislation his concern about the textile industry in his state moving "to other sections where they can take advantage of low standard wages." 80 Cong. Rec., Part 9, p. 10009 (74th Cong., 2d Sess.); Hearings before House Judiciary Subcommitte on H. R. 11554, 74th Cong., 2d Sess., p. 336. See also Senator Walsh's emphasis upon the critical problem of the boot and shoe industry in Massachusetts which was "moving up to New Hampshire * * * moving up to Maine" where wage standards were much lower and that this legislation would at least prevent Government contracts from encouraging such migration. Hearings on S. 3055, before House Judiciary Committee, 74th Cong., 1st Sess., pp. 116–118.

to competing firms or encourage migration of plants to low wage areas. The competitive and economic situation in the textile industry graphically illustrates that the effect of such separate community determinations in this, and in many other industries with similar national competitive and marketing conditions, would be precisely the opposite of that intended by the Congress which enacted the Public Contracts Act. The effect would be to freeze the disparate rates in the numerous separate communities, so that a textile mill in a community which had a high wage rate would be compelled to maintain that rate in order to secure Government work, while its competitor in a community in which wages were at low level would be in a position to underbid for Government work because it would not have to meet the wage rate which the mills with a higher minimum must pay. Government business would thereby be unavoidably channeled to the low wage producer since it would be impossible for the higher wage producer to reduce its wage levels to meet such competition. The effect would be to place national expenditures with "forces tending to depress wages and purchasing power" and "to use the leverage of the Government's immense purchasing power" to lower rather than to raise labor standards—a result diametrically opposed to the objectives of this Act as expressly described in this Court's decisions in the *Lukens Steel* and *Endicott Johnson* cases, *supra.*

The futility and absurdity of such an inflexible construction of the statute is further highlighted by its obvious administrative impracticability with respect to an industry with the characteristics of the textile industry. Determinations as to prevailing minimum wages if made on a community basis would impose an insuperable administrative burden. It would require thousands of separate proceedings to establish, by hearing, on the record, the separate prevailing minimum wage for the segment of the industry in each community. Moreover, on petitioners' theory, if the various plants in the community paid varying minimum wages, no wage determination could be made even for that community so long as no single precise minimum rate is predominant among the mills in the community. The result would be chaos or futility.

Petitioners' interpretation of the statutory language, which (as they have candidly admitted during the course of this litigation) would have the practical effect of nullifying the Act so far as the textile and many other industries are concerned, rests essentially on some isolated excerpts from the pre-enactment House debates. These statements are, at best, confusing and inconclusive, and indeed are self-evidently inconsistent with the specific statutory language and with the basic purposes of the legislation as a whole. The remarks on which petitioners rely confused the language of this Act with the restrictive geographic

limitations in the Davis-Bacon Act which were deliberately *excluded* from the Public Contracts Act (see p. 21, n. 7, p. 27, n. 11, *infra*). While these two statutes were designed to accomplish an analogous *general* policy, Congress clearly recognized the substantial differences in the *specific* evils sought to be ameliorated, and the crucial differences in the means appropriate for accomplishing their respective objectives.[6] The scheme of the Davis-Bacon Act was designed for application to construction contracts which must be performed at one precise location. A supply contract, in contrast, may be performed in as many places as there are factories and the place of performance is not ascertainable in advance of awarding of a contract.

Another crucial difference in the two statutes is that the Public Contracts Act provides for determination of a "prevailing *minimum*" whereas the Davis-Bacon Act provides for determining simply the "prevailing" wage standard for each craft. Practical problems not presented under the Davis-Bacon Act required significant differ-

[6] The limited nature of the analogy to the Davis-Bacon Act—"just in the establishment of the principle"—was made particularly clear during the hearings of the Healey bill. See discussion during testimony of AFL President William Green, Hearing before House Judiciary Subcommittee on H. R. 11554, 74th Cong., 2d Sess., p. 361. See also statements of Representatives Michener and Hancock (opponents of the legislation) confirming the differences in the Public Contracts Act during the debates on the bill which was enacted. 80 Cong. Rec. 10004, 10011.

ences in approach under the Public Contracts Act. And Congress expressly recognized these differences and provided for them by deliberately avoiding the restrictive geographic language of the Davis-Bacon Act, choosing instead more flexible alternative standards so as to allow sufficient latitude to accomplish the basic purposes of this Act.[7]

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[7] The fallacy of reliance upon the excerpts petitioner selects is well illustrated by the result reached by the majority of the Court of Appeals in the *Lukens Steel* case, *supra*, pp. 12–13. The result of that decision was to impose upon this Act virtually the identical restrictive geographic limitations expressly incorporated in the Davis-Bacon Act, despite the indisputable fact that the Davis-Bacon language was deliberately *excluded* from this Act. See this Court's *Lukens Steel* opinion, 310 U. S. at 120.

The confused and vague nature of the statements made during the pre-enactment legislative debates is quite understandable when considered in the context of the pre-enactment legislative background. The bill which was being debated was quite different from any of the bills on which the hearings had been held, and very little time was allotted to debating the specific language of the revised bill. After extensive hearings had been held on previous bills, the House Judiciary Committee then drafted a new bill in substantially the form of the present law. The new bill was evidently an attempt to compromise the different views expressed during the hearings. There were no hearings on this new bill which was reported to the House on June 5, 1936, and given precedence, with debate drastically limited. It passed the House less than two weeks later—on June 18. It passed the Senate two days later, on June 20, with no discussion or debate. It is apparent that there was very little opportunity for expression of considered opinion as to the meaning of specific language of the Act.

The long continued legislative acceptance of the administrative practice (including many years after this Court's *Lukens Steel* decision made it plain that any change would have to come from Congress) overwhelmingly supports the decision below. From the earliest wage determination issued shortly after the enactment of the Act (2 F. R. 233, *et seq.*) to the present time, the Act has consistently been construed as authorizing the Secretary to determine a single industry-wide prevailing minimum wage where competitive and marketing conditions require it in order to accomplish the purposes of the Act. The challenged administrative construction has been in effect now for almost 20 years, under successive Secretaries of Labor and during the administrations of both political parties. Of the 57 industries for which wage determinations have been issued during this period, all except four have provided a single industry-wide minimum wage rate (41 CFR Part 202).

During all of these years, Congress has not only acquiesced in this construction but has left it unchanged despite several specific attempts to secure legislative amendment. Congress has been repeatedly advised, officially and in detail, of the Secretary's industry-wide wage determinations, not only in the yearly budget estimates and in the

Secretary's annual reports,[8] on the basis of which general appropriations have been made, but also more specifically in special reports forming the basis for special appropriations.[9] In analogous situations, appropriations on the basis of such reports have been held to constitute Congressional confirmation or ratification of longstanding administrative practice. See *Brooks* v. *Dewar,* 313 U. S. 354, 361; *Fleming* v. *Mohawk Co.,* 331 U. S. 111, 116; *Wells* v. *Nickles,* 104 U. S. 444, 447; and *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147. See also *Inland Waterways Corp.* v. *Young,* 309 U. S. 517, 524–525.

In addition to these reports, which made clear beyond doubt the administrative practice of issuing industry-wide wage determinations, the ad-

[8] Annual Reports of the Secretary to Congress 1938, pp. 49–50; 1939, pp. 38–40; 1940, pp. 41–43; 1941, pp. 49–51; 1942, p. 36; 1948, p. 89: 1950, p. 315; 1951, pp. 73–75; the 1949 action was reported in the Annual Report of the Administrator of the Wage and Hour and Public Contracts Divisions (1949), p. 18.

[9] Hearings before House Committee on Appropriations, H. R. 6008, 81st Cong., 1st Sess. (1950), pp. 69–71, 81, 82.

Special and general appropriations voted for this work in years 1950 and 1951 totaled approximately $671,600. Second Supplemental Appropriation Act, 1950, c. 783, 63 Stat. 973, Title I; Department of Labor Appropriation Act, 1951, c. 896, 64 Stat. 595, Ch. V, Title I; Hearings before the subcommittee of the House Committee on Appropriations, H. R. 7786, 81st Cong., 2d Sess. (1950), Part 5, pp. 1047, 1166–68, 1177. Report of the House Committee on Appropriations, H. Rept. 1797, 81st Cong., 2d Sess. (1950), p. 92.

ministrative construction has been specifically brought to the attention of Congress on a number of occasions when proposals were made to amend it, and Congress has consistently declined to change it. The first such occasion was as early as April 1937—less than a year after the enactment of the Act. At that time the Department's construction was specifically considered by Congress in connection with a bill introduced by Senator Walsh for the purpose of clarifying what he termed the "ambiguous and confusing" language relating to "locality" (S. 2165, 75th Cong., 1st Sess., 81 Cong. Rec. 3504). He specifically referred to the administrative interpretation here challenged by petitioners and recognized it as an accurate reading of the statutory language, stating that "ambiguity results from the fact that the word 'locality' modifies only the last phrase" (81 Cong. Rec. 3504). Petitioners purport to find some support for their position in Senator Walsh's statement that it was the original legislative intent "to direct the administrative authority to give effect to geographic differentials" (Pet. 17). But it is plain from Senator Walsh's full statement in offering the bill that what he was speaking about was the purpose to give the Secretary authority to take geographic differentials *into account* in making *industry-wide determinations*—a view which the Secretary had already recognized and which he has taken into consideration through the years. Senator Walsh

was simply proposing to make that intent clear and express.

Neither Senator Walsh's bill, nor a similar companion bill introduced by Representative Healey in the House (H. R. 6449), was enacted into law. Significantly, the minority report[10] opposing the proposed amendment shows that the opponents as well as the proponents of the original Act were fully cognizant of the Secretary's construction, recognized it as a fair reading of the statutory language, and expressed a willingness to continue the existing administrative practice. They opposed the amendment on the ground that the Secretary's administration "has worked very well, all things considered" and it was advisable to let well enough alone and give the Act further "chance to function" without legislative interference. (*id.* p. 17). Thus the Congress which enacted the original Act affirmatively turned down a specific opportunity to amend the very construction which is here in issue.

In 1938 the administrative practice was specifically brought to the attention of the House Judiciary Committee in connection with a bill proposed by Representative Healey to impose additional labor standards on Government contracts (Hearings before sub-committee No. 1 on H. R. 9745, 75th Cong., 3d Sess). At that time the

[10] H. Rept. No. 2608 on H. R. 6449, 75th Cong., 3rd Sess., June 6, 1938.

Administrator of the Public Contracts Division, in answer to Congressman Healey's questioning, stated that of the 15 wage determinations issued up to that date, all except two provided a single industry-wide minimum wage (*id.* p. 139).

The administrative construction was again, in 1939, specifically brought to the attention of a Senate committee in the course of hearings on a proposal to expand the coverage of the Public Contracts Act. (S. 1032, Hearings before subcommittee of the Senate Committee on Education and Labor, 76th Cong., 1st Sess. (1939), pp. 95, 105.) Several industry representatives proposed specific changes in the Secretary's construction, but, again, the opportunity to make a change was declined. Instead, in the debates on this bill, Senator Walsh advised the Senate of the Secretary's procedure, stating that the proposed bill would not in any way disturb it. Indeed, in responding to some concern that was expressed that the Secretary might determine different minimum wages for different regions, to the competitive disadvantage of higher wage regions, Senator Walsh made it unmistakably clear that the problem had been left to the discretion of the Secretary who in most instances had made uniform industry-wide, and not regional, determinations (84 Cong. Rec. 9255–9257).

The most recent unsuccessful effort to secure specific legislative amendment of the Secretary's

construction was at the time of the enactment of the Fulbright Amendment. A proposal was made by Senator Fulbright to amend and substitute for the present "locality" language almost the identical "city, town, etc." language of the Davis-Bacon Act.[11] This proposal, too, was abandoned in favor of the measure which simply conferred standing to seek judicial review under prescribed

[11] The Davis-Bacon Act's geographic language (which was deliberately avoided in the enactment of the Public Contracts Act) provides for determination of minimum wages prevailing on projects of a character similar to the contract work "in the city, town, village, or other civil subdivision of the State in which the work is to be performed." 49 Stat. 1011 (40 U. S. C. 276a).

Cf. Senator Fulbright's proposed amendment to Section 1 (b) in his "New Section 305 in the Defense Production Act" submitted to the Senate Committee on Banking and Currency during hearings on S. 2594, 82d Cong., 2d Sess., and testimony on May 12, 13, 19, and 20, 1952, printed as Part V of the hearings on S. 2594 and S. 2645, p. 2473:

> SEC. (a) Subsection (b) of the first section of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936 (41 U. S. C. 35–45), is amended by striking out "locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contracts;" and inserting in lieu thereof the following: "(1) city, town, village, or other civil subdivision in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; or (2) if manufacturing or furnishing under said contract is to involve more than one such locality, then in the respective cities, towns, villages, or other civil subdivisions in which particular materials, supplies, articles, or equipment are to be manufactured or furnished under said contract."

conditions. Senator Fulbright frankly recognized that this amendment "does not constitute any change whatever in the substantive law" but that its effect was simply "to allow the courts to determine the correctness of the interpretation of the Act, as made by the Secretary of Labor."

This long history of administrative practice, which not only repeatedly received legislative recognition and approval, but which Congress declined to change on each occasion when the opportunity was offered, is, we submit, more than ample reason for overriding the mere hope of the sponsors of the Fulbright Amendment that the courts would make the change which Congress has repeatedly declined to make. Nor can the importance of this history be minimized, as suggested in the dissenting opinion below, by the fact that it has been "immune to judicial review" until enactment of the Fulbright Amendment. This fact, far from affording reason for judicial repudiation of the administrative interpretation, is plainly added reason for affirmance of it. For, during all of these years, the administrative interpretation was certainly not immune to Congressional review and Congress deliberately allowed the interpretation to become the established law. See *supra,* pp. 22–28.

2. None of the other issues presented by petitioners warrants the grant of certiorari. As noted *supra,* p. 2, n. 1, the petitioners advance no reasons for granting certiorari on any of these

issues. They are largely questions of evidence and administrative procedure relating to this particular case. Review of these evidentiary and procedural issues would involve detailed consideration of the voluminous record, which is plainly unnecessary in the absence of any showing that it would result in resolving questions of general importance. Particularly in view of the unresolved jurisdictional issue of the standing to sue of most of the petitioners, a grant of certiorari that would entail such extensive examination of the record seems patently unnecessary and inappropriate.

Moreover, there is no conflict or divergence of judicial opinion on any of these various issues, since only the majority decision of the Court of Appeals has ruled upon them. The District Court's decision was restricted to the issue of the Secretary's statutory authority to make an industry-wide wage determination, as was the dissenting opinion of Circuit Judge Washington.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied. In support of our opposition to certiorari, we have presented the argument in some detail, at the risk of exceeding the usual bounds of a response, because of the vital importance of a prompt termination of this litigation and of the injunctions which have seriously inter-

fered, for over three years now, with the Government's wage determination program and purchasing functions. Denial of certiorari, we believe, will best serve the public interest by achieving a prompt termination of these serious restraints, not only in the textile industry but also in other industries where similar litigation is pending or imminent.

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MARCH 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

Office - Supreme Court, U.S.
FILED
MAR 14 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

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NO. 682

COVINGTON MILLS, ALABAMA MILLS, INC., ET AL,

Petitioners

vs.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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The Secretary of Labor concedes that the issue presented by this case "is unquestionably one of national importance."[1] He declares, however, that the decision rendered by the division or panel majority in the Court below is "so clearly correct"[2] that this Court should not review the case.

[1] The Secretary's brief in opposition to Petition for Certiorari herein, p. 10.

[2] Idem, p. 11.

This seems a remarkable assertion in view of the fact that of all the Judges who have examined the question at issue upon the merits, none, except the two constituting the panel majority below, have considered the views espoused by the Secretary to be "clearly correct" or correct at all, and that the Secretary himself, so far from describing his position in the matter as "clearly correct," has officially admitted that it is "not wholly free from doubt."[3]

Though the case presents "an important question of Federal law,"[4] as to which there is a very substantial cleavage of judicial opinion, and though the Secretary has himself stated that Congress specifically "made provision" for this question to be taken "to Court for ultimate judicial resolution"[5] — nevertheless the Secretary now opposes the Court's examining and passing upon the matter at all.

What are the reasons offered by the Secretary as to why this Court should not examine the issue in dispute? They appear to be, in sum, as follows:

> That the Secretary's "construction" of the provisions of the Walsh-Healey Act relating to determi-

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[3] Decision by James P. Mitchell, Secretary of Labor—In the Matter of Determination of Prevailing Minimum Wages for the Woolen and Worsted Industry. January 27, 1954. 19 Fed. Reg. 535.

[4] Rule 19 of this Court. The same important question is presented in the petition for certiorari in No. 755—*The Allendale Co. et al. vs. James P. Mitchell, Secretary of Labor, et al.*,— filed on March 12, 1956, the United States Court of Appeals for the District of Columbia Circuit, on the same date and before judgment, having stayed the wage determination involved in that case from going into effect as to petitioners therein.

[5] Decision by James P. Mitchell, Secretary of Labor—Supra.

nations of minimum wages is "so clearly correct" that this Court should not disturb, nor review, that construction.

That the Secretary having, over a period of years, construed the Walsh-Healey Act as conferring upon him authority to prescribe a uniform Nation-wide minimum wage for an industry, without Congress having enacted any legislation to prevent him from doing so, this Court should now refuse to adjudge what authority the Secretary does in truth have under the Act.

That this Court should not review this case because of the time the Court would require in doing so.

In support of the first of these propositions, that is, that despite the "locality" language of the Statute, the Secretary is "clearly correct" in fixing wages on a Nation-wide basis, he advances two theories. In the first place, says the Secretary, there are two bases or standards for determination of minimum wages under the Act, namely "similar work" and "the particular or similar industries," which are not subject to the "locality" limitation of the Act at all. The Secretary then says that if he is not "clearly correct" about this,[6] then he is "clearly correct" in another interpretative theory which he offers, namely,

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[6] Secretary's brief in opposition to Petition for Certiorari herein, pp. 8, 9.

that the word "locality," in the light of the purpose of the Act, is not restrictive anyhow but is readily to be construed as meaning the entire United States. The Secretary asks the Court to accept *one or the other* of these interpretations as being "so clearly correct" that the case need not be examined or reviewed.

As to the first of these theories, without at this time burdening the Court with grammatical analysis of the Statute or *discussion* of its legislative history, it should be sufficient to point out that in the *Lukens* case the Secretary did not even argue this theory to the Court of Appeals and that when the case came before this Court, instead of declaring this theory to be "clearly correct" the Secretary specifically abandoned it as not comporting "with the statutory language."[7]

Moreover, this theory that the word "locality" has no application to some of the Act's standards for determining minimum wages and that, for example, the standard of "similar work" is wholly divorced from and unaffected by the limitation of locality — such theory has certainly not occurred to this Court as being "clearly correct." For to the contrary, this Court in *Powell vs. United States Cartridge Company,* 339 U. S. 497, 515, in referring to the Walsh-Healey Act, described it as requiring an employer to pay minimum wages according to what prevailed for "similar work in the locality." Yet the Secretary now

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[7] Brief for Secretary of Labor, filed in this Court in *Perkins, et al vs. Lukens Steel Company, et al,* p. 131.

says that it is so clear as to be beyond review that "similar work" and "in the locality" have no relation whatever to each other in this Statute.

The Secretary's alternative theory, which he asks the Court to regard as clear beyond review if the Court will not so regard his first theory, is that no matter whether "locality" applies to all methods of wage determinations under the Act, it is not to be considered a word of restriction anyway and can readily be expanded to encompass the entire United States of America. To this the petitioners would simply say that it stultifies Congress to assume that it enacted a United States Statute and employed therein the word "locality" as describing and applying to the whole United States, and it is indeed a reflection upon the authors and sponsors of the Walsh-Healey Act to insist that they did not mean what they said when they repeatedly and emphatically declared to Congress that the authority of the Secretary under the Act would be "to determine what the prevailing minimum wages are *in the locality in which the materials are to be manufactured or furnished*" and that his power would be to require those who do Government business to pay "a minimum wage *according to the scale prevailing in the community.*"[8]

Yet the Secretary's interpretative theory thus belying and stultifying Congress is "so clearly correct," he says

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[8] Petition, pp. 14-17.

that it ought not to be even reviewed by this Court.

This is so, declares the Secretary, because the basic purpose of the Act was to withhold Government business from "firms that pay sub-standard wages"[9] and that to prevent any Government business going into lower wage-paying localities, the word locality must be *made to mean* the whole United States. The plain and simple answer to this is that Congress labored over this very problem[10] and deliberately chose, as the language and legislative history of the Act positively demonstrate, to allow a manufacturer to have Government business if he maintains the wage level prevailing in his locality.[11] The Secretary says that an assumption to the contrary, though in the teeth of the language and legislative history of the Statute, is "so clearly correct" that there should be no review of it by this Court.

Further, says the Secretary, the determination of minimum wages on a locality basis would be an "insuperable administrative burden" which "would have the practical effect of nullifying the Act so far as many industries are concerned" and that the petitioners "have candidly

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[9] Determination in present case, Joint Appendix, p. 28, 18 Fed. Reg. 472.

[10] Petition, pp. 14-15.

[11] Idem, pp. 17-21.

admitted" that this is so.[12] The petitioners are at a loss to understand this gratuitous assertion on the part of the Secretary. The petitioners have certainly not admitted that the making of wage determinations on a locality basis would be an "insuperable" burden "nullifying" the Act. Quite to the contrary, the Secretary of Labor who was in office when the Act was framed and who testified in the hearings preceding its enactment, declared that "a great deal more work" would "not" be required "to determine the prevailing wages" for "the various sections of the country."[13]

In any event the Secretary is beyond bounds in undertaking to redraft the Statute, and in asking this Court to accept without review his redraft, simply because of what he now conceives or declares to be the difficulty he would encounter in administering the Statute as Congress wrote it.

We come next to the Secretary's contention that since Congress over a period of years has not stopped the Secretary from making Nation-wide minimum wage determinations, therefore it must be so conclusively presumed that the Secretary has been acting within his statutory authority that this Court should not even look into the matter. As to this, in the first place, any general

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[12] Secretary's brief in opposition to Petition for Certiorari herein, p. 19.

[13] Hearings on H. R. 11554, 74th Cong., 2d Sess., p. 130.

assumption that Congress actually knew how the Secretary was interpreting the Walsh-Healey Act is hardly in accord with reality. Committee records show how amazed members of the Congress were, as late as 1950 and 1952, to learn that the Secretary was determining minimum wages under the Act on a Nation-wide basis.[14] Certainly when Congress in 1952 voted[15] to give private citizens access to the Courts to test the validity of such action on the part of the Secretary, it was not expressing approval of or acquiescence in the Secretary's action. The Secretary has himself officially admitted that this is so.[16]

But, says the Secretary, though Congress has clearly expressed the intent that the Secretary's action should be judicially examined, this Court should decline to make any such examination. This argument the intervenor, Textile Workers Union of America, summarizes in the edifying observation that Congress having passed "the buck," this Court should refuse to accept it.[17]

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[14] Hearings before subcommittee of House Committee on appropriations. H. R. 6008, 81st Cong., 1st Sess., pp. 69-71. Hearings on S-2594, 82nd Cong., 2nd Sess., pp. 2481-2482, 2706, 2708.

[15] The Fulbright Amendment to the Walsh-Healey Act, 41 U. S. C. 43(a).

[16] Decision by James P. Mitchell, Secretary of Labor — In the Matter of Determination of Prevailing Minimum Wages for the Woolen and Worsted Industry. January 27, 1954. 19 Fed. Reg. 535.

[17] Brief for the Textile Workers Union of America in opposition to Petition for Certiorari herein, p. 11.

Such a contention comes to the proposition that whatever questions Congress deliberately or expressly leaves to judicial decision, this Court should decline to pass upon, for that Congress should legislate the answers to such questions itself. On the contrary, it is of course the duty of the courts, regardless of what Congress does or does not see fit to enact by way of new legislation, to "hold unlawful and set aside agency action . . . found to be . . . not in accordance with the law . . . or in excess of statutory jurisdiction, authority or limitations . . ."[18] This has always been so and in recent years has been expressly enjoined upon the courts by the Administrative Procedure Act, which Act by specific enactment of Congress is applicable to the present case.[19]

Finally, the Secretary emphasizes and re-emphasizes that the wage determination "program" for "the textile industry" has been "virtually ineffective now for over three years" by reason of the injunction issued in this case and that "important public interests" will "be served" by a termination of this litigation now, without the delay "that a grant of certiorari would necessarily entail."[20]

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[18] Administrative Procedure Act, 5 U. S. C. 1009(e).

[19] The Fulbright Amendment to the Walsh-Healey Act, 41 U. S. C. 43(a).

[20] Secretary's brief in opposition to Petition for Certiorari herein, pp. 5, 10, 11, 29.

As to the Secretary's assertion that his wage determination "program" for the textile industry has been rendered "virtually ineffective" by the injunction issued in this case, it is to be remembered that such injunction has not been general but has been limited to the plaintiffs before the Court. As to all other persons the Secretary has been at liberty to make his determination entirely effective.

With respect to the Secretary's insistence that the case should be ended now and without further ado, for that there has already been "substantial delay," if it is to be rightly considered that there has been delay, the responsibility therefor must rest upon the shoulders of the Secretary. On January 15, 1953, the Secretary issued the determination which is the subject of this litigation. Within less than a month thereafter, and by February 11, 1953, the plaintiffs' complaints had been filed.[21] By February 19, 1953, hearings had been held and injunction had been issued.[22] Thereafter the Secretary, though under the injunction which he now finds so intolerable, made no move whatever in the case for more than a year.

Commencing on March 22, 1954,[23] and throughout most of that year, the Secretary conducted extensive interrogatory proceedings. It was not until December 31,

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[21] Joint Appendix, p. 86.

[22] Idem, pp. 125, 127.

[23] Idem, p. 128.

1954, that the Secretary filed motion for summary judgment in the District Court.[24] By April 7, 1955, the plaintiffs had filed cross-motion for summary judgment and hearing had been held and final judgment rendered in the District Court.[25]

By June 29, 1955, the record had been filed and briefs had been prepared and filed and argument heard in the Court of Appeals. The decision by a divided panel of the Court of Appeals was not issued until December 1, 1955. By January 10, 1956, a petition for rehearing had been prepared, filed and denied in the Court of Appeals.

Thereafter, not exhausting the usual ninety day period, but within thirty days, the petitioners brought the case to this Court.

From this chronology it is to be seen that if the Secretary is now concerned as to delay, he can lay no blame on the petitioners. Throughout this litigation, whenever the next move has rested on the petitioners, they have moved with dispatch and often under forced draft.

Moreover, it would seem obvious that this Court cannot grant or deny certiorari on any consideration that it would require time for the Court to pass upon the case.

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[24] Joint Appendix, p. 239.

[25] Idem, pp. 269, 275.

It goes without saying that the consideration transcending all others is that the case shall be *rightly* decided.

Respectfully submitted,

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SUITE 617
REPUBLIC 7-6868

March 13, 1956

Honorable Harold B. Willey
Clerk
Supreme Court of the United States
Washington, D. C.

Re: The Allendale Co. et al. v. James P. Mitchell, Secretary of Labor, et al., No. 755.

Dear Mr. Willey:

Yesterday a petition for a writ of certiorari before judgment to the Court of Appeals for the District of Columbia Circuit was filed in the above cause. The petitioners are 28 woolen and worsted companies with plants in 14 states. The question presented in their petition is the same as that presented in Covington Mills et al. v. Mitchell et al. (No. 682), namely, whether the Secretary of Labor, in purporting to determine a single nationwide prevailing minimum wage for an industry, has disregarded the mandate of Section 1(b) of the Walsh-Healey Public Contracts Act that his determinations be made by "locality" (41 U.S.C. §35(b)).

The purpose of this letter is to request the Court to consider the petitions in this cause and in Covington Mills together in determining whether to review the Secretary's action and, if necessary to that end, to defer consideration of the petition in Covington Mills until the responses have been filed herein. Petitioners believe that their petition sets forth important reasons for granting certiorari which the Court should consider in passing on both petitions.

Among other things, the petition filed yesterday demonstrates that the important question of federal law presented was intended by Congress to be subject to "ultimate judicial resolution," that resolution of such question is of vital concern to every industry whose members contract with the Government, that there is a conflict in decisions of the Court below, that the Secretary's interpretation of Section 1(b) has not been consistent, and that there has been no Congressional approval or ratification of any interpretation of the Act by the Secretary. The petitioning wool companies believe that, as their petition shows, a consideration of their views along with those of petitioners in Covington Mills will be of material assistance to the Court.

Petitioners have proceeded with all possible speed in submitting their petition. The District Court's order upholding the Secretary's determination was entered February 10, 1956. Twenty-five days later, on March 6, 1956, we advised you by letter that the petition was ready, but that we were unable to file because counsel for the Secretary was unwilling to consent to transmittal of the record from the Court of Appeals until that Court had acted on petitioners' motion for a stay pending final disposition on certiorari. Yesterday the Court of Appeals entered an order granting petitioners the requested stay, over the objection of the Secretary and two intervenors, and authorized the Clerk of that Court to transmit the record to this Court. Our petition was filed the same day.

For the reasons stated, we respectfully request that the Court consider the petitions in Covington Mills and this cause at the same time, and that you bring our request to the attention of the Court.

Very truly yours,

C. Roger Nelson

C. Roger Nelson
Attorney for Petitioners